No. 92-9093-CSY
Status: GRANTED
CAPITAL CASE

Title: John Joseph Romano, Petitioner
v.
Oklahoma

Docketed:
June 14, 1993

Court: Court of Criminal Appeals
of Oklahoma

Counsel for petitioner: Peters,Lee Ann Jones

Counsel for respondent: Blalock,A. Diane

Entry	Date	Note	Proceedings and Orders
1	Jun 14 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jul 23 1993		Brief of respondent Oklahoma in opposition filed.
3	Jul 29 1993		DISTRIBUTED. September 27, 1993
6	Oct 4 1993		REDISTRIBUTED. October 8, 1993
8	Oct 12 1993		REDISTRIBUTED. October 15, 1993
10	Oct 25 1993		REDISTRIBUTED. October 29, 1993 (Page 24)
12	Nov 1 1993		Petition GRANTED. limited to the following question: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?"
			**********
13	Dec 22 1993		Joint appendix filed.
14	Dec 22 1993		Brief of petitioner John Joseph Romano filed.
15	Jan 18 1994		Brief amici curiae of Ohio, et al. filed.
16	Jan 18 1994		Brief of respondent Oklahoma filed.
17	Feb 2 1994		SET FOR ARGUMENT TUESDAY MARCH 22, 1994. (2ND CASE).
18	Feb 7 1994		CIRCULATED.
20	Feb 23 1994	X	Reply brief of petitioner filed.
19	Feb 25 1994		Record filed.
		*	Original record proceedings Court of Criminal Appeals and District Court of Oklahoma (BOX)
21	Mar 22 1994		ARGUED.

92-9093

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN JOSEPH ROMANO,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

LEE ANN JONES PETERS
ASSISTANT PUBLIC DEFENDER
OF OKLAHOMA COUNTY
320 Robert S. Kerr, Room 611
Oklahoma City, Oklahoma 73102
405/278-1550

COUNSEL FOR PETITIONER

49 PP

QUESTIONS PRESENTED

1. Can a state appellate court, consistent with the Eighth and Fourteenth Amendments to the United States Constitution, hold that an error occurred that had the potential of diminishing the jury's sense of responsibility yet not vacate the sentence of death imposed by that jury without determining either that the error had "no effect" on the sentencing determination or that the error did not present an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously?

2. Can a state appellate court, consistent with the Eighth and Fourteenth Amendments to the United States Constitution, refuse to consider allegations of error briefed on direct appeal of a capital case?

INDEX

AUTHORITIES CITED

CASES **PAGE**

STATUTES and CONSTITUTIONS

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN JOSEPH ROMANO,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

LEE ANN JONES PETERS
ASSISTANT PUBLIC DEFENDER
OF OKLAHOMA COUNTY
320 Robert S. Kerr, Room 611
Oklahoma City, Oklahoma 73102
405/278-1550

COUNSEL FOR PETITIONER

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN JOSEPH ROMANO,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

To: The Honorable Chief Justice and Associate Justices
of the United States Supreme Court

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on the 13th day of January, 1993.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is published and may be found at 847 P.2d 368 (Okl.Cr.1993) (affirming the convictions and sentence of death). The opinion is attached to this Petition as Appendix A. The Order Denying Rehearing was not reported and is attached as Appendix B.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on the 13th day of January, 1993. A timely petition for rehearing was denied on March 17, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Okla. Stat. tit. 21, § 701.13(1991)(excerpts):

> B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any error enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the evidence supports the jury's of judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

STATEMENT OF THE CASE

On January 30, 1987, the Petitioner, JOHN JOSEPH ROMANO, was sentenced to death for the murder of Loyd Thompson in Oklahoma County District Court Case No. CRF-86-3920. One day before the sentence was formally imposed, he was charged with the unrelated murder of Roger Sarfaty in Oklahoma County Case No. CRF-86-1231. The State sought the death penalty, alleging four aggravating circumstances, including that the Petitioner had been previously convicted of a felony (specifically, the murder of Loyd Thompson) involving the use or threat of violence to the person. The only support for this allegation was the Judgment and Sentence for the Thompson murder conviction, which was on direct appeal. The Judgment and Sentence, introduced into evidence over vehement objection by defense counsel, reflected that the Petitioner had already been sentenced to death.

During the pendency of the appeal of the conviction for the murder of Roger Sarfaty, the murder conviction and accompanying death sentence for the killing of Loyd Thompson were reversed for a new trial.

On direct appeal of the Sarfaty murder conviction, in Proposition of Error XVII in Petitioner's Brief-in-Chief, the Petitioner argued that the sentence of death was unreliable under the Eighth Amendment because the jury's sense of responsibility was diminished by the introduction of the Judgment and Sentence informing the jury that Mr. Romano was already under a sentence of death for another crime, coupled with certain acts and comments by the trial court and the prosecutors. The Oklahoma Court of Criminal Appeals agreed that the fact that Mr. Romano had been sentenced to death by another jury was irrelevant. The court also conceded that the jury's learning a defendant had previously been sentenced to death for another murder "could diminish the jury's sense of importance of its role and mitigate the consequences of their decision." 847 P.2d at 390. Despite having recognized the error's potential to diminish the jury's sense of responsibility, the court held that it was "highly unlikely" that this error had such effect because the jury had been instructed in their responsibility to weigh the evidence and to follow the law. The court further held that the erroneous "admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process." The death sentence was affirmed. 847 P.2d at 390-91.

In affirming the death sentence, the Oklahoma Court of Criminal Appeals failed to address three errors that had been fully briefed on appeal. Two issues, raised and briefed by the

Petitioner in a pro se brief and accepted for filing by the court, argued that the State was barred and/or estopped from prosecuting the Petitioner in the present case because the State had used the evidence of the Sarfaty homicide to obtain the death penalty in the Thompson homicide trial. Although the court addressed a separate and distinct double jeopardy argument concerning re-litigating an aggravating circumstance rejected in the first (Thompson) murder trial, the court did not address the double jeopardy arguments concerning whether the Petitioner could be tried at all for the homicide of Sarfaty once the State used that evidence to secure a death sentence in another trial.

The third issue, fully briefed by appellate counsel, concerned an issue that arose during the pendency of the appeal. State law requires the Court of Criminal Appeals to determine whether the evidence supports the jury's finding of statutory aggravating circumstances. The State had offered three items of evidence to support the "continuing threat" aggravating circumstance: that the Petitioner had previously been convicted of murder; the testimony of an informant; and that this murder was committed in a violent fashion. The prior conviction was also offered to support the aggravating circumstance of prior felony involving the use or threat of violence.

By the time the Court of Criminal Appeals undertook the statutorily-required review, the evidence supporting two of the aggravating circumstances had materially changed. As previously stated, while this case was on appeal, the other murder conviction

was vacated. Additionally, the informant recanted his testimony and avowed in an affidavit that he had fabricated the testimony in order to curry favor with the district attorney on charges he was then facing.

In compliance with court rules, appellate counsel tendered a supplemental brief raising an additional assignment of error, in light of the new developments, regarding the sufficiency of the evidence supporting the aggravating factors "continuing threat" and "previous conviction involving the use or threat of violence," as well as the reliability of the sentence. Although the court did address the impact of the vacation of the previous murder conviction on the aggravating circumstance of "previous conviction of a felony involving the use or threat of violence", the impact of the vacation of the previous murder conviction on the aggravating circumstance of "continuing threat" was ignored or overlooked by the Court of Criminal Appeals, along with the impact of the informant's recantation and the two issues briefed by the Petitioner.

In a Petition for Rehearing, appellate counsel pointed out the oversight and reurged the errors. In the Order Denying Petition for Rehearing, the court erroneously stated that the issues had been fully addressed in the opinion.

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari to resolve a split of authority among the state and federal circuit courts regarding the standard to determine whether Caldwell errors require vacation of a death sentence.

The standard of review employed by the Oklahoma Court of Criminal Appeals in deciding that it was "highly unlikely" that admission of an exhibit reflecting that the Petitioner had already been sentenced to death "would" have diminished the jury's sense of responsibility is in conflict with other state and federal circuit courts that have decided this issue.

Both the Illinois Supreme Court and the Mississippi Supreme Court have been faced with this exact issue and have decided that evidence of a prior death sentence is wholly inadmissible, prejudicial, and destroys the reliability of the death sentence.

The Mississippi Supreme Court decided the case of West v. State, 463 So.2d 1048 (Miss. 1985), shortly before this Court announced the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). The court reasoned that "if the jury knows that the appellant is already under a sentence of death it would tend to relieve them of their separate responsibility to make that determination." Id. at 1052-53. Without discussing whether this error might have been harmless, the court reversed the case for this and other errors that occurred at trial.

The same error occurred in the case of People v. Hope, 106 Ill.2d 265, 508 N.E.2d 202 (Ill. 1986). Several jurors heard news reports on the capital case on which they were sitting. The news

reports contained information that the defendant had previously been sentenced to death. The Illinois Supreme Court held: "The **possibility** that the jury, even one member, may have sentenced the defendant to death on the basis of an irrelevant, highly prejudicial and non-statutory aggravating factor constitutes reversible error." 508 N.E.2d at 206 (emphasis added).

Counsel has found no federal circuit case involving this same type of Caldwell error. For other types of Caldwell errors, however, the circuits are split on the standard to employ once a Caldwell error is found. The Fifth Circuit uses the same test employed by the plurality in Caldwell, namely, that the error had "no effect" on the jury. See Sawyer v. Butler, 881 F.2d 1273, 1284-85 (5th Cir. 1989)(en banc), aff'd on other grounds, 497 U.S. 225 (1990). The Tenth Circuit has held that the sentence must be vacated when there is a "substantial possibility" that the error affected the sentencing decision. See Hopkinson v. Shilinger, 888 F.2d 1286, 1295 (10th Cir. 1989). Finally, the Eleventh Circuit uses the "reasonable probability" test, that the sentence must be vacated if there is a reasonable probability that, but for the Caldwell error, the outcome would have been different. See Tucker v. Kemp, 802 F.2d 1293, 1295-96 (11th Cir. 1986)(en banc)(per curiam), cert. denied, 480 U.S. 911 (1987).

The Oklahoma Court of Criminal Appeals' nebulous "highly unlikely" test directly conflicts with the clear per se prejudice holdings of the Illinois and Mississippi courts. Moreover, the "highly unlikely" test adds a confusing test to the existing "no

effect", "substantial possibility", and "reasonable probability" tests utilized in the federal courts. This Court should grant certiorari to determine the appropriate standard for review of a Caldwell error and resolve the split of authority in the courts below.

II.

This Court should grant certiorari to decide the important question of whether an appellate court can uphold a death sentence after finding that the jury's sense of responsibility could have been diminished by having been informed that the Petitioner whose fate they are to determine has already been sentenced to die for another murder merely by finding that it is "highly unlikely" that the error would have had that effect.

The Oklahoma Court of Criminal Appeals acknowledged that informing the jury that the defendant has already been sentenced to die has the potential for diminishing the jury's sense of responsibility. Rather than applying the "no effect" test formulated by the plurality in Caldwell v. Mississippi, 472 U.S. 320 (1985), however, the Oklahoma court fashioned its own less stringent test: the court stated that the instructions to the jury concerning their responsibilities made it "highly unlikely that the jury's sense of responsibility would have been diminished based upon their knowledge of the prior imposition of the death sentence." Romano v. State, 847 P.2d at 390 (Okl.Cr.1993).

The Oklahoma test derogates the Eighth Amendment right to reliable sentencing in capital cases and impermissibly places the burden of proof on the Petitioner to show that he was in fact prejudiced by the error.

The Oklahoma court's analysis is confusing. The court acknowledged that capital cases require heightened scrutiny [under the Eighth Amendment], but then reviewed the error under the Fourteenth Amendment instead ("the determination to impose the death penalty [was not] a denial of due process.) Id. at 391. Furthermore, the Oklahoma court afforded the sentencing determination "a presumption of correctness" and found "no reason to question the jury's conclusion." Id.

Although the court determined that the error created a risk that the penalty was imposed arbitrarily or capriciously ("[l]earning that the defendant had previously received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of their decision" 847 P.2d at 390), the court did not determine, as did the plurality in Caldwell, that the error had no effect on the jury's determination. The court's analysis and conclusion are in conflict with the Eighth Amendment.

Moreover, the Oklahoma court impermissibly placed the burden of proving prejudice on the Petitioner. Just this term this Court expounded on the different standards of review for forfeited and non-forfeited errors. Justice O'Connor, writing for the Court in U.S. v. Olano, No. 91-1306 (Apr. 4, 1993), explained that the difference between "harmless error" and "plain error" is the allocation of the burden of proof. If the error was not brought to the attention of the trial court, the appellate court cannot correct the error unless the defendant shows the error was

prejudicial. If error was brought to the attention of the trial court, the appellate court has authority to correct the error unless the error did not affect substantial rights.

In this case, the error was clearly not forfeited as Petitioner's trial counsel strenuously objected to having the jury exposed to an exhibit reflecting that the Petitioner had already been sentenced by another jury to die. The objection was overruled and the exhibit was admitted. Although this substantial Eighth Amendment error was in no way forfeited, the Oklahoma Court of Criminal Appeals apparently allocated the burden of proving prejudice on the Petitioner rather than on the state ("it is highly unlikely that the jury's sense of responsibility would have been diminished"). Romano, 847 P.2d at 390.

This Court should grant certiorari to determine whether the allocation of the burden of proof and the standard of review promulgated by the Oklahoma Court of Criminal Appeals is consistent with the Eighth and Fourteenth Amendments to the United States Constitution.

III.

This Court should grant certiorari and remand the case back to the Oklahoma Court of Criminal Appeals with a directive to address all issues raised on direct appeal for the reason that direct appeal is an important and necessary safeguard against the arbitrary and capricious imposition of the death penalty.

The Oklahoma Court of Criminal Appeals failed to address three errors raised, all of which were founded in the Constitution. State law requires the Court of Criminal Appeals to make a

determination on all errors raised and to determine whether the aggravating circumstances are supported by the evidence. See Okla. Stat. tit. 21, §§ 701.13(B) and (C)(2)(1991). Nevertheless, the court failed in this case to address three fully-briefed errors of constitutional magnitude, one of which involved a determination of whether an aggravating circumstance was supported by legal evidence.

In upholding the constitutionality of the death penalty statutes of Georgia, Texas, and Florida in Gregg v. Georgia, 428 U.S. 153 (1976), Jurek v. Texas, 428 U.S. 262 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), respectively, this Court stressed the importance of appellate review in death penalty cases. The plurality in Gregg characterized the automatic appellate review as "an important additional safeguard against arbitrariness and caprice." 428 U.S. at 198. Justice White, concurring in the judgment and joined by then Chief Justice Burger and present Chief Justice Rehnquist, agreed that Georgia's provision for appellate review was an important aspect of the legislative scheme. Id. at 211 (WHITE, J., concurring in the judgment).

Likewise, the plurality in Jurek entrusted the provision for "prompt judicial review of the jury's decision in a court with statewide jurisdiction. . . to promote the evenhanded, rational, and consistent imposition of death sentences under [Texas] law." 428 U.S. at 276. The same view was echoed again in Proffitt, where the plurality determined that any risk that the death penalty might

be imposed arbitrarily or capriciously would be "minimized by Florida's appellate review system." 428 U.S. at 251.

The Court of Criminal Appeals' refusal on direct appeal of this capital case to address assignments of error of constitutional magnitude stripped the defendant of one of the major safeguards against arbitrariness and caprice and destroyed the reliability of sentencing. The Oklahoma Court's claim that these issues were addressed is belied by the Opinion itself. Stating that the issues have been addressed cannot substitute for actually addressing the issues.

The statutory requirement that all constitutional errors enumerated be considered promotes reliability and finality of death penalty decisions. This Court should grant certiorari to compel the Court of Criminal Appeals to follow state law, which was enacted in conformance with this Court's rulings, and address all the issues that were raised in the direct appeal of this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this petition for a writ of certiorari will be granted.

Petitioner respectfully requests that this Court vacate the death sentence in this case and grant such other relief as it deems appropriate.

Respectfully submitted,

ROBERT A. RAVITZ
Oklahoma County Public Defender

Lee Ann Jones Peters

LEE ANN JONES PETERS
Assistant Public Defender
Oklahoma County Public Defender's Office
611 County Office Building
Oklahoma City, Oklahoma 73102
405/278-1550

COUNSEL FOR PETITIONER

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN JOSEPH ROMANO,

Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.

CERTIFICATE OF SERVICE

I, Lee Ann Jones Peters, member of the bar of this Court, do hereby certify that I have this day served a copy of Petitioner's Petition for Writ of Certiorari to the Court of Criminal Appeals for the State of Oklahoma, and Motion to Proceed In Forma Pauperis, on counsel for Respondent, State of Oklahoma, by depositing the same with the United States Mail with adequate first class postage, addressed to Sandra D. Howard, Chief of Criminal Division, Office of the Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105 this 11th day of June, 1993. All parties required to be served have been served.

Lee Ann Jones Peters

LEE ANN JONES PETERS

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN JOSEPH ROMANO,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

APPENDIX "A"

Opinion of the Oklahoma Court of Criminal Appeals

Romano v. State, 847 P.2d 368 (Okl.Cr.1993)

to confuse the mother's alleged wilfulness in getting pregnant against all advice and common sense, with the requirement that the pregnancy be "adequate of itself" to cause the result. The result was that Donald died after four days of life. Even under defendants' theory *two* things were required to *combine* to bring about Donald's death: (1) the doctor's negligent failure to administer Rho–GAM following her fourth pregnancy, and (2) her wilful pregnancy knowing of her condition. Her pregnancy alone, even if deliberate, was not "adequate of itself" to cause the result.

The doctors have not conceded that the failure to give Rho–GAM amounted to negligence. The question of supervening cause will not come into play, however, unless it is determined that there was some earlier actionable act or omission by the doctors. *See Thompson*, 652 P.2d at 264. Regardless of the outcome of this issue, an instruction on supervening cause is not warranted. If there is no negligence on the part of the doctors, the instruction is superfluous. If there is negligence by the doctors, the second prong of the test is still not satisfied and the instruction would be improper. The supervening cause instruction should not be given where, as here, the result could not have come about in the absence of the first actor's alleged misconduct, which was failure to give Rho–GAM. The mother's alleged wilful and foolish impregnation could not have been "adequate of itself" to cause the result.

SIMMS, Justice, concurring in part, dissenting in part:

In my opinion the instruction containing the language "elected to become pregnant" is neither vague nor ambiguous. I believe the instruction was properly given to the jury and I dissent to that part of the majority opinion holding otherwise.

John Joseph ROMANO, Appellant,

v.

STATE of Oklahoma, Appellee.

No. F–87–441.

Court of Criminal Appeals of Oklahoma.

Jan. 13, 1993.

Rehearing Denied March 17, 1993.

Defendant was convicted of murder first degree and robbery with dangerous weapon, in the District Court, Oklahoma County, William Saied, J. Defendant appealed. The Court of Criminal Appeals, Lumpkin, V.P.J., held that: (1) evidence supported conviction; (2) conviction for another murder, which was ultimately reversed, could not be used as prior felony conviction aggravating factor in imposition of death penalty; and (3) with invalid aggravating factor nor considered, remaining aggravating factors continued to outweigh mitigating factors.

Affirmed.

1. Criminal Law ⇐1166.16

Capital murder defendant was precluded from claiming that hearing was required as to whether prospective juror had communicated knowledge of another murder for which defendant was convicted, due to prospect's employment of that murder victim's daughter; defendant had not used peremptory challenge to exclude prospect and exhausted all of his other peremptory challenges.

2. Jury ⇐99(1)

Constitutional guaranty of fair and impartial trial does not exclude service by juror having knowledge of facts and circumstances involving case, but only by juror who uses that knowledge to form opinions concerning merits of case, or who forms negative opinion of defendant based on that knowledge. U.S.C.A. Const. Amend. 6.

ph ROMANO, Appellant,

v.

of ahoma, Appellee.

No. F–87–441.

minal Appeals of Oklahoma.

Jan. 13, 1993.

Denied March 17, 1993.

t was convicted of murder in and robbery with dangerous e District Court, Oklahoma am Saied, J. Defendant ap- Court of Criminal Appeals, J., held that: (1) evidence viction; (2) conviction for an- , which was ultimately re- not be used as prior felony ravating factor in imposition lty; and (3) with invalid ag- tor nor considered, remaining actors continued to outweigh tors.

a; 1166.16

urder defendant was precluding that hearing was required prospective juror had com- owledge of another murder endant was convicted, due to ployment of that murder vic- r; defendant had not used hallenge to exclude prospect, l all of his other peremptory

(1)

ional guaranty of fair and im- does not exclude service by knowledge of facts and cir- volving case, but only by ju- that knowledge to form opin- ng merits of case, or who e opinion of defendant based owledge. U.S.C.A. Const.

3. Criminal Law ⇐868

Hearing was not required to determine whether jury foreman in capital murder case had knowledge of defendant's involvement in another murder and had passed it on to jury; all members of jury had been subjected to "exhaustive" voir dire and had affirmed their ability to determine case impartially based only upon competent evidence. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐868

Hearing was not required to determine whether jury had been improperly provided with information regarding an earlier murder involving capital murder defendant, by jury foreman who knew daughter of victim in other murder, even though when other murder was mentioned during reading of bill of particulars, two jurors exhibited some surprise. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐868

Hearing was not required to determine whether jury considering capital murder case had been improperly provided with information regarding another murder case in which defendant had been involved, by jury foreman who knew daughter of victim in that murder, even though jury had reported to judge that they were deadlocked six to six, and had returned conviction just a few hours later. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(2)

Capital murder defendant was not denied effective assistance of counsel by virtue of his attorney's deciding to retain on jury panel juror who knew daughter of murder victim in another case involving defendant; decision was trial strategy and in any event defendant failed to show how ultimate decision would have been different had juror in question not served. U.S.C.A. Const.Amend. 6.

7. Jury ⇐33(1.4)

Quashing of jury panel in capital murder case was not required on grounds that statute allowing jurors 70 years of age to opt out of jury service prevented jury from being representative of cross section of community; defendant had failed to make necessary prima facie showing that exemption excluded significantly numerous and distinct group, that representation of this group in venire panels was not fair and reasonable in relation to number of people in community, and that underrepresentation was due to systematic exclusion of group from jury selection process. 38 Okl.St.Ann. § 28, subd. A.

8. Jury ⇐131(13)

Voir dire of each prospective jury member, as to his or her attitude on capital punishment, was not required in capital murder case. U.S.C.A. Const.Amend. 6.

9. Jury ⇐33(2.1), 108

Prospective jurors were not improperly removed from panel in capital murder case in order to obtain jury panel predisposed to imposing death penalty; most jurors in question stated they believed in death penalty but wavered throughout voir dire on their ability to actually impose sentence, supporting conclusion that their capital punishment views would have prevented or substantially impaired their duties as jurors. U.S.C.A. Const.Amend. 6.

10. Jury ⇐33(2.1, 5.1)

Principle of *Batson* case, that state could not use peremptory challenge to remove prospective juror solely because of race, did not extend so as to prohibit state from exercising peremptory challenge to jurors in capital murder case from whom court received equivocal response on voir dire question as to willingness to impose death sentence. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐552(3)

When evidence against defendant is wholly circumstantial, considering evidence and inferences therefrom in light most favorable to state, evidence must be inconsistent with any reasonable hypothesis other than defendant's guilt.

12. Criminal Law ⇐552(3)

In order to obtain a conviction based upon circumstantial evidence, state is not required to exclude every conceivable hypothesis or negate any possibility other than guilt.

13. Criminal Law ⇐422(1)

When two or more defendants are charged with acting in concert, evidence against each is available against others.

14. Homicide ⇐253(1)

Evidence supported conviction for capital murder; witness testified that defendant had told him he planned to rob victim and would have to kill him, victim was known to keep in his apartment buckets of change for use at store and shortly after estimated time of death defendant was apprehended in possession of numerous quarters, papers used to wrap jewelry were found near defendant's car and defendant had been seen with jewelry, and rope had been taken from accomplice's room which could have been used to strangle victim.

15. Criminal Law ⇐1171.1(3)

Capital murder defendant had received a fair trial, even though he claimed 14 instances of prosecutorial misconduct during first-stage closing argument allegedly involving misrepresentation, vouching for credibility of prosecution witness, denigrating defense witnesses, eliciting sympathy for victim and aligning himself with jury; although some remarks, taken singly, exceeded bounds of fair argument, comments in context did not seriously affect fairness of trial. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐1153(1)

Determination that evidence should be excluded as irrelevant should be affirmed unless there is clear showing of abuse accompanied by prejudice.

17. Criminal Law ⇐359

In order for evidence tending to show that another person has committed crime to be admissible, there must be some showing of an overt act on part of another toward commission of crime; it is not sufficient to show possible motive on part of another.

18. Homicide ⇐178(1)

Capital murder defendant was properly precluded from introducing evidence that alleged prostitute at local club might have been murderer of victim; there was indication that she knew victim from club he frequented, but there was no indication that she was victim's girlfriend or had any involvement with murder.

19. Homicide ⇐178(1)

Capital murder defendant was properly precluded from introducing evidence that woman with whom victim had been seen arguing shortly before estimated time of his death was perpetrator, police had been unable to locate woman and there was no further evidence linking her to incident.

20. Homicide ⇐178(1)

Evidence tending to show that another person had committed capital murder could be excluded; even though alleged perpetrator knew decedent from frequenting same pool hall and had been destitute before decedent's death and seen with cash and jewelry after death, there was no overt act shown toward commission of murder.

21. Criminal Law ⇐419(2)

Statement by witness in capital murder case, that it was common knowledge around pool hall that victim who was patron had been killed on certain date and body not discovered until later, was admissible over hearsay objection; statement was offered not as to time of death of victim, but rather as to patrons' understanding of time of death.

22. Criminal Law ⇐404.5

Demonstrative evidence is admissible if relevant and probative value outweighs prejudicial effect.

23. Criminal Law ⇐404.65

Rope removed from residence of codefendant in capital murder case was admissible as demonstrative evidence; victim had been killed by strangulation, medical examiner found rope to be consistent with ligature marks on victim's body, and presence of rope allowed jury to visualize one of weapons used in attack.

24. Criminal Law ⇐476.1

Police detective could furnish expert witness testimony, in capital murder case, as to how rope recovered from house of codefendant had been tied in a garrotte, and could demonstrate how it could have been used as murder weapon; subject mat-

...s victim's girlfriend or had any ... with murder.

...de ⇐178(1)

...m... ...r defendant was proper... from introducing evidence that ... whom victim had been seen ...rtly before estimated time of ...as perpetrator; police had been ...cate woman and there was no ...dence linking her to incident.

...de ⇐178(1)

...e tending to show that another ...committed capital murder could ..., even though alleged perpetra... ...cedent from frequenting same ...nd had been destitute before ...death and seen with cash and ...r death, there was no overt act ...rd commission of murder.

...l Law ⇐419(2)

...nt by witness in capital murder ...it was common knowledge ... hall that victim who was pa... ...en killed on certain date and ...covered until later, was admis... ...hearsay objection; statement ... not as to time of death of ...rather as to patrons' under... ...ti... ...f death.

...l Law ⇐404.5

...trative evidence is admissible ...and probative value outweighs ...effect.

...l Law ⇐404.65

...moved from residence of code... ...apital murder case was admissi... ...nstrative evidence; victim had ...y strangulation, medical exam... ...ope to be consistent with liga... ...on victim's body, and presence ...wed jury to visualize one of ...ed in attack.

...l Law ⇐476.1

...letective could furnish expert ...imony, in capital murder case, ...ope recovered from house of ... had been tied in a garrotte ...emonstrate how it could have ...s murder weapon; subject mat-

ter was specialized and beyond knowledge of average juror. 12 Okl.St.Ann. §§ 2401, 2702.

25. Criminal Law ⇐706(6)

Police officer could demonstrate, using assistant district attorney as model, how rope taken from house of codefendant was allegedly used as garrotte to strangle victim in capital murder case, over claim that demonstration was prejudicial; demonstration was useful to jury, as general public was not familiar with use of garrotte or process of strangulation.

26. Constitutional Law ⇐47

When reviewing constitutionality of legislative act, court does not look to Constitution to determine whether legislature is authorized to do an act, but rather to see whether act is prohibited.

27. Criminal Law ⇐1206.1(2)

Statute providing that jury rendering verdict of unanimous recommendation of death was required to designate in writing statutory aggravating circumstances or circumstances which it unanimously found beyond reasonable doubt, did not violate constitutional prohibition against court orders forcing jury to make findings of particular questions of fact; constitutional provision applied to guilt phase of trial, rather than sentencing phase. 21 Okl.St.Ann. § 701.11; Const. Art. 2, § 19; Art. 7, § 15.

28. Homicide ⇐357(11)

Aggravating circumstance required for death penalty in capital murder case, that murder was especially heinous, atrocious or cruel, was not unconstitutionally vague; it had been narrowed through jury instruction to apply only to instances of death preceded by torture or serious physical abuse.

29. Criminal Law ⇐1159.5

When sufficiency of evidence of aggravating circumstance is challenged on appeal in capital murder case, proper test is whether there was any competent evidence to support state's claim that aggravating circumstance existed.

30. Homicide ⇐357(11)

Evidence supported finding of aggr... vated circumstance based on heinousne... of crime, in sentencing phase of capit... murder case; there was evidence victi... had struggled with assailants, was beate... with blunt instrument several times an... ultimately died of strangulation.

31. Homicide ⇐358(1)

For purposes of establishing, as aggr... vating circumstance in sentencing phase ... capital murder case, that defendant ha... killed victim for purpose of avoiding ... preventing lawful arrest or prosecution, i... tent of defendant may be inferred fro... circumstantial evidence.

32. Homicide ⇐357(8)

Evidence supported presence of aggr... vating factor, in sentencing phase of cap... tal murder case, that defendant had kille... victim for purpose of avoiding or preven... ing lawful arrest or prosecution; witne... had testified defendant told him that ... would be necessary for defendant to ki... victim in connection with planned robbery... in order to keep victim from identifyin... him.

33. Homicide ⇐357(6)

Jury's refusal to accept, as an aggr... vating factor in sentencing phase of capit... murder case, that defendant presented con... tinuing threat to society, did not preclud... use of same evidence to establish continu... ous threat aggravation factor in later tria... involving different victim. U.S.C.A. Const... Amend. 5; Const. Art. 2, § 21.

34. Homicide ⇐357(6)

Aggravating circumstance for pur... poses of imposing death sentence in capit... murder case, that defendant posed continu... ing threat to society, was not unconstitu... tionally vague; factor was readily under... standable.

35. Homicide ⇐358(1)

Evidence tending to show that capita... murder defendant had committed anothe... murder was admissible in sentencin... phase, as tending to prove aggravating cir... cumstance that defendant presented "con...

tinuing threat" to society, even though defendant's conviction was not final.

36. **Homicide** ⇐358(1)

Evidence tending to show that capital murder defendant had committed another homicide could be introduced in support of aggravating factor of continuing danger to society in sentencing phase of capital murder case, even though conviction for first murder had been reversed and case remanded for new trial; case had not been reversed on basis of insufficient evidence of guilt.

37. **Homicide** ⇐357(7)

Prior conviction of capital murder defendant for having committed another murder, which had been reversed on appeal, could no longer provide support for aggravating factor in sentencing phase of capital murder case, that defendant had committed "prior violent felony."

38. **Constitutional Law** ⇐203
Criminal Law ⇐1134(3)
Jury ⇐31(11)

Court of Criminal Appeals could reweigh aggravating and mitigating circumstances, considered by jury in sentencing phase of capital murder case, to determine whether death penalty was still warranted after one of aggravating factors had been invalidated, without depriving defendant of constitutional right to be tried by jury or prohibition against ex post facto laws. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Amend. 6.

39. **Criminal Law** ⇐655(1), 723(1)

Comment by judge to jury, that its function was to recommend punishment, and comment by prosecutor during closing argument that jury was to "put the defendant on death row" did not diminish jury's sense of responsibility for determining death sentence. U.S.C.A. Const.Amend. 5.

40. **Criminal Law** ⇐449(2)

Jail chaplain could not be asked to give her opinion as to whether religious accomplishments of capital murder defendant while incarcerated were genuine or represented "jailhouse religion"; any such opinion would have been mere speculation on her part and not helpful to clear understanding of issue. 12 Okl.St.Ann. § 2701.

41. **Criminal Law** ⇐723(1)

State's closing argument in sentencing phase of capital murder case, which made reference to defendant having taken up "jailhouse religion," was not objectionable, argument was reasonable inference based upon defendant's raising of term while questioning jail chaplain, and defendant's apparent attempt to prove genuineness of defendant's religion.

42. **Criminal Law** ⇐796

Instruction that jury was to consider as mitigating factors at sentencing phase, those which in fairness and mercy could be considered as extenuating or reducing degree of moral culpability or blame, coupled with instruction that what was mitigating evidence was for jury to determine, did not prevent jury from considering any relevant mitigating evidence. 21 Okl.St.Ann. § 701.11.

43. **Homicide** ⇐311

Trial court was not required to instruct jury, in capital murder case, that it had option to return life sentence regardless of its findings respecting aggravating and mitigating circumstances. 21 Okl.St.Ann. § 701.11.

44. **Homicide** ⇐311

Trial court could instruct jury, in sentencing phase of capital murder case, that it could not allow sympathy, sentiment or prejudice to enter into its deliberations.

45. **Homicide** ⇐311

Trial court properly instructed jury, in capital murder case, that finding of aggravating circumstances beyond reasonable doubt was in itself not enough to assess death penalty, and that aggravating circumstances must clearly outweigh mitigating circumstances before death could be imposed.

46. **Homicide** ⇐357(1)

While state must prove beyond reasonable doubt existence of at least one of enumerated aggravating circumstances, before death sentence can be imposed in capi-

and not helpful to clear under
of issue. 12 Okl.St.Ann. § 2701

inal Law ⇐723(1)

's ( )ng argument in sentencing
cap...l murder case, which made
to defendant having taken up
religion," was not objectionable,
was reasonable inference based
endant's raising of term while
g jail chaplain, and defendant's
attempt to prove genuineness of
's religion.

nal Law ⇐796

uction that jury was to consider
ing factors at sentencing phase,
h in fairness and mercy could be
as extenuating or reducing de-
ral culpability or blame, coupled
uction that what was mitigating
as for jury to determine, did not
y from considering any relevant
evidence. 21 Okl.St.Ann.

ide ⇐311

ourt was not required to instruct
pital murder case, that it had
eturn life sentence regardless of
s respecting aggravating and
cir...stances. 21 Okl.St.Ann.

de ⇐311

ourt could instruct jury, in sen
se of capital murder case, that
allow sympathy, sentiment or
enter into its deliberations.

de ⇐311

urt properly instructed jury, in
der case, that finding of aggra
umstances beyond reasonable
in itself not enough to assess
ty, and that aggravating cir
must clearly outweigh mitigat
tances before death could be

le ⇐357(1)

ate must prove beyond reason
existence of at least one of
ggravating circumstances, be
ntence can be imposed in capi

tal murder case, determination of weight to be accorded aggravating and mitigating circumstances is not a fact which must be proved beyond reasonable doubt, but is rather a balancing process.

47. **Criminal Law** ⇐1208.1(4)

Death penalty was not unconstitutional for allowing unbridled prosecutorial discretion in seeking that penalty. U.S.C.A. Const.Amend. 8.

48. **Robbery** ⇐30

One thousand-year prison sentence, imposed on capital murder defendant for robbery committed at same time, was not excessive; it was supported by prior felony convictions and violent manner in which robbery was committed. U.S.C.A. Const. Amend. 8.

49. **Homicide** ⇐357(4, 8, 11)

Aggravating factors in capital murder case, that crime was particularly heinous, atrocious or cruel, committed to avoid lawful arrest or prosecution, by defendant presenting continuous threat to society, outweighed mitigating factors consisting of testimony regarding difficult childhood, love and respect of family and friends, record of being good worker, status as trustee in county jail and role as problem solver, completion of bible study courses and involvement in jail ministry, and prospects of rehabilitation.

An appeal from the district court of Oklahoma County, William Saied, District Judge.

John Joseph Romano, Appellant, was tried by jury and convicted of Robbery with a Dangerous Weapon, After Former Conviction of a Felony (21 O.S.1981, § 801) and Murder in the First Degree (21 O.S.1981, § 701.7) in Case No. CRF-87-397, in the District Court of Oklahoma County. The jury found the existence of four aggravating circumstances and recommended punishment of death. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal. AFFIRMED.

1. In January, 1987, Appellant and co-defendant

Cindy Foley, Tim Wilson, Asst. Pu
Defenders, Oklahoma City, Trial Cou
for appellant.

Lee Ann Jones Peters, Chief, Appell
Div., William C. Devinney, Asst. Appell
Public Defender, Oklahoma City, Appell
Counsel for appellant.

Robert Macy, Dist. Atty., Lou Keel, Gr
Ryan, Asst. Dist. Attys., Oklahoma Ci
Trial Counsel for appellee.

Robert H. Henry, Atty. Gen. of Ok
homa, Carol Price Dillingham, Asst. At
Gen., Oklahoma City, Appellate Counsel f
appellee.

OPINION

LUMPKIN, Vice-Presiding Judge:

Appellant John Joseph Romano was tri
by jury and convicted of Murder in t
First Degree (21 O.S.1981, § 701.7) a
Robbery with a Dangerous Weapon, Aft
Former Conviction of Two or More Felonie
(21 O.S.1981, § 801), Case No. CRF-87-39
in the District Court of Oklahoma Count
The jury found the existence of four aggr
vating circumstances and recommende
punishment of death for the murder convi
tion and one thousand (1000) years impri
onment for the robbery conviction. Th
trial court sentenced accordingly. Fro
this judgment and sentence Appellant ha
perfected this appeal.

Appellant and co-defendant David Wood
ruff were found guilty of the first degre
murder of Roger Sarfaty. The decedent'
body was discovered on October 16, 1985
in his apartment in Oklahoma City. Th
decedent had been beaten, strangled an
stabbed. Further facts will be presente
as necessary.

I. JURY SELECTION ISSUES

[1] Appellant contends that it was re
versible error for the trial court to refus
to conduct a hearing as to whether jur
foreman McDonald had knowledge of Ap
pellant's involvement in the Lloyd Thomp
son murder [1] and whether this knowledg

Woodruff were convicted of the first degre

had been communicated to the jury. The record reveals that Mr. Eugene McDonald was one of the original twelve venirepersons called to service. The State's list of witnesses was belatedly read to the jury, preceding the eighth peremptory challenge to the panel. One of the venirepersons stated that he recognized the name "Cheryl Moody" as that of a secretary at his place of employment. Although the prospective juror is not identified by name in the transcript, the Appellant states that it was Mr. McDonald. This is not disputed by the State. The following exchange then took place:

MR. KEEL: (Prosecutor) In the event she is called to testify in this case, is there anything about the relationship you have had from what you have known of Cheryl Moody, to this point, that you think would make it hard for you to be fair and listen to the testimony. In other words, because of you having known her, would you give her more or less weight her testimony than you would anybody else?

PROSPECTIVE JUROR: No, sir.

MR. KEEL: So you can be fair to both sides in this case in spite of that?

PROSPECTIVE JUROR: I believe so. (Vol. II, Tr. 193–194)

The defense did not question him further, did not challenge him for cause nor remove him with a peremptory challenge. At that time, Appellant and co-defendant Woodruff each had one (1) peremptory challenge remaining. Both challenges were waived. Mr. McDonald remained on the jury and was ultimately selected as foreman.

On the seventh day of trial, before closing arguments were to be given in the second stage, counsel for Appellant and co-defendant Woodruff asked that the jurors be individually questioned to determine whether during first stage deliberations they had learned of the defendants' connection with the Thompson murder. It was revealed that Cheryl Moody was the daughter of Lloyd Thompson.

The reason given by defense counsel for the motion was their opinion that the jury did not react appropriately to the State's reading of the bill of particulars and the mention of the convictions for the Thompson murder and the length of time during first stage deliberations.[2] The trial court denied the motion, stating that to grant it would violate the sanctity of the jury.

Appellant now argues in the alternative that failure to hold a hearing to determine whether Mr. McDonald communicated his knowledge to the other jurors was error, the failure to excuse McDonald from the jury was error, and that trial counsel was ineffective for failing to remove him from the jury. We disagree with Appellant's arguments and find no reason for reversal or modification. The record reflects that Mr. McDonald was competent to serve as a juror and that Appellant has failed to show that he was denied a fair trial by Mr. McDonald's service on the jury. The question of the competency of jurors is addressed to the sound discretion of the trial court, and absent an abuse thereof, the finding of the trial court will not be upset on review. *Greathouse v. State*, 503 P.2d 239, 240 (Okl.Cr.1972).

During voir dire, Mr. McDonald clearly indicated that he understood that the defendants were presumed to be innocent of the charges against them; that the State had the burden of proof and if the State did not meet that burden of proving guilt beyond a reasonable doubt, that the defendants' must be found not guilty. He further indicated that he could keep an open mind and listen to all the evidence presented by both the State and the defense and that he knew of no reason why he could not

murder of Lloyd Thompson and sentenced to death.

2. The record reflects that the jury began its first stage deliberations on May 22, 1987. Sometime before 6:30 p.m., the jury reported to the trial judge that it was split 6 to 6. The jury was then sent to dinner before resuming its deliberations.

A verdict of guilty was returned that same day. Comments by defense counsel indicate that the jury returned approximately five (5) hours after announcing their deadlock with a guilty verdict, while comments by the trial court indicate it was one hour

earned of the defendants' connec-
the Thompson murder. It was
hat Cheryl Moody was the daugh-
·yd Thompson.

so: ·en by defense counsel for
w… their opinion that the jury
act appropriately to the State's
the bill of particulars and the
f the convictions for the Thomp-
r and the length of time during
deliberations.[2] The trial court
motion, stating that to grant it
late the sanctity of the jury.

nt now argues in the alternative
e to hold a hearing to determine
fr. McDonald communicated his
to the other jurors was error,
to excuse McDonald from the
error, and that trial counsel was
for failing to remove him from
We disagree with Appellant's
and find no reason for reversal
ation. The record reflects that
ald was competent to serve as a
hat Appellant has failed to show
as denied a fair trial by Mr.
s service on the jury. The ques-
e competency of jurors is ad-
the sound discretion of the trial
absent an abuse thereof, the
th· ·al court will not be upset
t… thouse v. State, 503 P.2d
Okl.Cr.1972).

·oir dire, Mr. McDonald clearly
hat he understood that the de-
·ere presumed to be innocent of
s against them; that the State
·den of proof and if the State did
hat burden of proving guilt be-
asonable doubt, that the defen-
t be found not guilty. He fur-
ted that he could keep an open
sten to all the evidence present-
the State and the defense and
w of no reason why he could not

d guilty was returned that same day.
by defense counsel indicate that the
ed approximately five (5) hours after
g their deadlock with a guilty verdict,
ments by the trial court indicate it
our.

be a fair juror. He assured defense counsel that he would hold the State to its burden of proof and make them prove each and every element, beyond a reasonable doubt, of the crimes charged against the defendants. Mr. McDonald indicated that he could follow the court's instructions as to the law, and that he was not prejudiced against the defendants. (Vol. I, Tr. 83, 154–155, 174)

By failing to exercise his last peremptory challenge, Appellant has waived whatever claim he may have had concerning the partiality or improper makeup of the jury. *See Greathouse*, 503 P.2d at 241 (wherein the trial judge refused to grant a mistrial after a juror indicated that he knew one of the State's witnesses. The conviction was affirmed based on the juror's indication that knowledge of the witness would not affect his partiality. We held that when defense counsel failed to inquire as to the knowledge of the witness by the juror, any error was waived.) *See also Hamilton v. State*, 79 Okl.Cr. 124, 152 P.2d 291, 295 (1944).

[2, 3] However, due to the nature of Appellant's allegations, we will address the issue further. The jury trial system is founded on the impartiality of a body of peers selected by counsel. Voir dire is the procedure designed to give a criminal defendant the opportunity to explore the opinions and personal knowledge of potential jurors who may ultimately decide his fate. One of the purposes of voir dire is to ensure a criminal defendant's right to a fair and impartial jury. The critical fact to be determined is whether the defendant received a fair trial from jurors who could lay aside any personal opinions and base a verdict on the evidence.

In the present case, the trial court conducted an exhaustive voir dire. Those prospective jurors with preconceived opinions for or against Appellant, who could not set aside those opinions or who had doubts about their ability to be impartial, were excused. The remaining prospective jurors were questioned further as to their knowledge of persons involved in the case. Counsel for the State and for both defendants carefully questioned each prospecti
juror to make certain that each could a
would set aside any emotion he or s
might have concerning this case and d
pend solely on the evidence presented du
ing trial to decide the outcome. As a r
sult, we find that the defendants were le
with twelve impartial jurors.

The mere fact that Mr. McDonald kne
Lloyd Thompson's daughter does not re
der him incapable of serving on the jur
A criminal defendant is not entitled to j
rors who know nothing about his cas
Hale v. State, 750 P.2d 130, 134 (Okl.C
1988), *cert. denied*, 488 U.S. 878, 109 S.C
195, 102 L.Ed.2d 164 (1988); *Brecheen
State*, 732 P.2d 889, 892 (Okl.Cr.1987), *cer
denied*, 485 U.S. 909, 108 S.Ct. 1085,
L.Ed.2d 244 (1988); *Wooldridge v. Stat*
659 P.2d 943, 946 (Okl.Cr.1983). The co
stitutional guarantee of a fair and impartia
trial does not exclude service by a juro
with knowledge of facts and circumstance
involving the case, but only those person
who use that knowledge to form opinion
concerning the merits of the case, or wh
form a negative opinion of the defendan
based on that knowledge. *Smithey
State*, 385 P.2d 920, 924 (Okl.Cr.1963).

[4, 5] Judge Saied's refusal to hold a
evidentiary hearing to determine whethe
or not any improper information had bee
imparted to the other jurors was a prope
determination. In order to establish juro
misconduct, "a defendant must show actua
prejudice from any alleged jury misconduc
and defense counsel's mere speculation an
surmise is insufficient upon which to caus
reversal". *Chatham v. State*, 712 P.2d 69
71 (Okl.Cr.1986). *See also Parsons
State*, 603 P.2d 1144, 1146 (Okl.Cr.1979)

The record in the present case is abso
lutely barren of anything other than specu
lation or surmise by defense counsel
Judge Saied, an experienced trial judge
disputed defense counsel's observations o
the record. He stated that he observed th
jury during the reading of the bill of partic
ulars. At the mention of the prior murde
conviction, he noticed two jurors in particu
lar who showed some surprise. He adde
that he did not think that Mr. McDonal

knew of the murder conviction, but if he did, there was nothing to indicate that he had said anything about it to the other members of the jury. Regarding the length of the first stage jury deliberations, he did not find it unusual to have a jury deadlocked 6 to 6 and return a few hours later with a guilty verdict. He further commented:

> [i]f I did this I think I would be violating sanctity of the jury itself. They have deliberated and we have no right to go in and ask how they did it and why they did it. I have given them an admonition every time, a very strong one I think you all know. In fact I add to it more than was actually required by statute, and it has been a very strong admonition in my opinion. I can't invade the province of the jury and ask them his question..... (Vol. VII, Tr. 5)

Whether or not to hold an evidentiary hearing was within the discretion of the trial court. Finding no abuse of that discretion, we find no error.

[6] Similarly, we do not find defense counsel's decision to leave Mr. McDonald on the jury indicative of ineffective assistance of counsel; in spite of a comment by the trial judge that he thought Mr. McDonald would be removed by the defense. Counsel admitted that the decision not to remove Mr. McDonald was a part of their trial strategy. In hindsight, it may appear to the Appellant that the strategy may not have been appropriate, but this is not sufficient to meet the test of ineffectiveness established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We have previously refused to evaluate the performance of trial counsel on hindsight. *Dunham v. State*, 762 P.2d 969, 975 (Okl.Cr.1988); *Smith v. State*, 650 P.2d 904, 908 (Okl.Cr.1982). Further, through the review of cases on appeal, this court is familiar with trial counsel for both defendants and find them to be experienced, capable capital litigators whose strategic choice to leave Mr. McDonald on the jury was well within the range of professionally reasonable judgment.

We find that Appellant was not prejudiced by counsel's decision as he has failed to show that there is a reasonable probability that the outcome of the case would have been different. Based upon the foregoing, we find that Appellant is not entitled relief due to the service of Mr. McDonald on the jury. Accordingly, this assignment of error is denied.

[7] Prior to trial Appellant filed a Motion to Quash the jury panel asserting then as he does now on appeal that he was denied a jury representative of a fair cross-section of the community because 38 O.S. 1981, § 28(A), allows jurors seventy years of age or above to opt out of jury service. In *Moore v. State*, 736 P.2d 161, 165 (Okl.Cr.1987), *cert. denied*, 484 U.S. 873, 108 S.Ct. 212, 98 L.Ed.2d 163 (1987), we stated that *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), held that a defendant must establish a prima facie case in order to show a violation of the requirement that criminal defendants are entitled to juries drawn from a fair-cross section of the community. Appellant has failed to make such a prima facie showing in the instant case, as he has not shown that this exemption from jury service excludes a sufficiently numerous and distinct group, that representation of this group in venires is not fair and reasonable in relation to the number of such people in the community, and that this underrepresentation is due to the systematic exclusion of the group in the jury selection process. *Sellers v. State*, 809 P.2d 676, 682 (Okl.Cr.1991); *Fox v. State*, 779 P.2d 562, 566 (Okl.Cr.1989). Accordingly, this assignment of error is denied.

[8] Appellant also alleges that the trial court erred in not allowing individual voir dire of each juror, out of the hearing of the others, as to their views on capital punishment. In *Foster v. State*, 714 P.2d 1031, 1037 (Okl.Cr.1986), *cert. denied*, 479 U.S. 873, 107 S.Ct. 249, 93 L.Ed.2d 173 (1986), we stated:

> [a]lthough such a practice may be allowed by a trial judge, it is an extraordinary measure ... Unless the danger of prejudicing the jurors by exposure to

at Appellant was not preju- isel's decision as he has failed the as a reasonable probabil- ity of the case would have t. Based upon the foregoing, Appellant is not entitled relief rvice of Mr. McDonald on the lingly, this assignment of er-

to trial Appellant filed a Mo- the jury panel asserting then now on appeal that he was representative of a fair cross- community because 38 O.S. allows jurors seventy years ve to opt out of jury service. *State*, 736 P.2d 161, 165 (Okl. *t. denied*, 484 U.S. 873, 108 L.Ed.2d 163 (1987), we stated *Missouri*, 439 U.S. 357, 99 L.Ed.2d 579 (1979), held that a ust establish a prima facie to show a violation of the that criminal defendants are ries drawn from a fair-cross e community. Appellant has e such a prima facie showing t case, as he has not shown mption from jury service ex- ici numerous and distinct epi...entation of this group in t fair and reasonable in rela- umber of such people in the nd that this underrepresenta- o the systematic exclusion of the jury selection process. *ite*, 809 P.2d 676, 682 (Okl.Cr. *v. State*, 779 P.2d 562, 566 Accordingly, this assign- r is denied.

lant also alleges that the trial n not allowing individual voir uror, out of the hearing of the their views on capital punish- *...ter v. State*, 714 P.2d 1031, 1986), *cert. denied*, 479 U.S. 249, 93 L.Ed.2d 173 (1986),

such a practice may be al- trial judge, it is an extraordi- ire ... Unless the danger of the jurors by exposure to

damaging information is a grave problem or some special purpose would be served, it is unlikely that individual voir dire would be justified. We find no abuse of discretion in not allowing the procedure. Nor do we find any abuse of discretion in this case. The record reflects that both the State and the defense conducted an extensive voir dire examination. It does not appear that Appellant was prejudiced by not questioning the venire individually. *Sellers*, 809 P.2d at 682, *Fox*, 779 P.2d at 568; *Vowell v. State*, 728 P.2d 854, 857 (Okl.Cr.1986). Accordingly, this assignment of error is denied.

[9] Appellant also alleges that the prosecutor's use of peremptory challenges to remove all potential jurors with any reservations about the death penalty produced a jury "uncommonly willing to condemn a man to die" in violation of the rule *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). He also urges extension of the rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), that the State cannot use a peremptory challenge to remove a prospective juror solely because of race, to require that this Court prohibit the State from exercising a peremptory challenge to excuse a juror from whom the court received equivocal responses on voir dire.

In *Witherspoon* the Supreme Court held that the exclusion of those potential jurors who express "conscientious scruples" against the death penalty violates a defendant's right to a fair and impartial jury. A standard was established that a venireperson could be excused from jury service on a capital case only if he or she made "unmistakably clear" his or her automatic refusal to impose a death sentence or an inability to impartially judge a defendant's guilt. In *Walker v. State*, 723 P.2d 273, 281 (Okl.Cr. 1986), this Court recognized that the Supreme Court had superseded the *Witherspoon* standard into a single test of "whether the juror's view would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This single test not only eliminated the requirement that a juror would vote automatically against the death penalty before he or she may be excused, but also removed the requirement that such a view must be proved with "unmistakable clarity." *Id.*, 469 U.S. at 424, 105 S.Ct. at 852.

Applying this rule to the instant case, we find that the two prospective jurors[3] in question were not improperly removed from the panel. Both stated that they believed in the death penalty but wavered throughout voir dire on their ability to actually impose such a sentence. We find that their responses established the fact that their views about capital punishment would have prevented or substantially impaired their duties as jurors in accordance with the instructions and their oath. *See Battenfield v. State*, 816 P.2d 555, 558 (Okl.Cr.1991); *Banks v. State*, 701 P.2d 418, 423 (Okl.Cr.1985) *cert. denied*, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 611 (1988).

[10] In *Batson* the Supreme Court determined that the Equal Protection Clause prohibits "exclusion of potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89, 106 S.Ct. at 1719. This rule does not alter existing principles which entitle a prosecutor "to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried." *Id.* No authority supports the proposition that equivocal jurors create a suspect class which invokes the stringent requirements of the Equal Protection Clause, and which would permit extension of the limited *Batson* rule. To the contrary, peremptory challenges need not be supported by any specific reasoning, unless the defendant asserts purposeful discrimination under *Batson*. 22 O.S.1981, § 654. We have previously held that both the

3. Venirepersons Stark and Paine.

State and the defense may excuse prospective jurors who respond equivocally to questions about the death penalty. *White v. State*, 674 P.2d 31 (Okl.Cr.1983). We are not persuaded to change our view.

No violation of equal protection principles arose in the present case. We have found no evidence in the record to suggest that jury selection involved purposeful discrimination or yielded a jury with an uncommon willingness to impose the death penalty. Accordingly, this assignment of error is denied.

II. GUILT-INNOCENCE ISSUES

In his second assignment of error, Appellant contends that the evidence presented at trial was insufficient to support the verdicts of guilt. He argues that the circumstantial nature of the evidence of both the murder and the robbery, at best, raised only suspicion and speculation of guilt.

[11, 12] Circumstantial evidence and the reasonable inferences drawn therefrom have the same probative effect as direct testimony. When the evidence against the defendant is wholly circumstantial, as in this case, considering the evidence and inferences therefrom in the light most favorable to the State, it must be inconsistent with any reasonable hypothesis other than the defendant's guilt. *Greer v. State*, 763 P.2d 106, 107 (Okl.Cr.1988); *Smith v. State*, 695 P.2d 1360, 1362 (Okl.Cr.1985). The State is not required to exclude every conceivable hypothesis or negate any possibility other than guilt. *D.R.R. v. State*, 734 P.2d 310, 311 (Okl.Cr.1987).

[13] When an appellant contends that he was convicted upon insufficient evidence, this Court must consider and examine the entire record. *Lee v. State*, 661 P.2d 1345, 1354 (Okl.Cr.1983). While each co-defendant is entitled to have his case decided on the basis of the evidence against him, this does not require this Court to review the evidence in a vacuum. Where two or more defendants are charged with acting in concert, evidence against each is available against the others. *Cooper v. State*, 584 P.2d 234, 237 (Okl.Cr.1978).

[14] The evidence presented by the State in the instant case showed that the decedent was a jewelry dealer who lived alone in an apartment at the May Ridge Apartment complex in Oklahoma City. The decedent kept large amounts of jewelry, both new and older tarnished pieces, in his apartment. The decedent was also known to wear jewelry, particularly rings on every finger. In his apartment the decedent kept large cardboard buckets of change, specifically quarters. He was a regular customer at the Celebrity Club, coming in every night at approximately 12:30 and remaining until the 2:00 a.m. closing. The decedent was last seen leaving the club on Saturday, October 12 at 2:00 a.m.

On October 16, 1985, the decedent was found murdered. He had been beaten, strangled and stabbed five (5) times. Testimony from medical witnesses indicated that he had been dead for approximately two to three days. A newspaper, dated October 12, 1985, was found opened in his apartment. Rolled, unopened newspapers dated October 13, 14, and 15, 1985, were found outside the apartment. No buckets of change were found in the apartment nor was any jewelry found on the decedent. A pair of slacks with the pockets pulled out was found draped over a door.

Appellant was incarcerated at the Enid Community Treatment Center during September and October 1985. He regularly received leave passes from the Center, including a weekend pass for October 11 through 13, 1985, when he checked out to Oklahoma City. While in Oklahoma City Appellant would stay at the residence of his girlfriend Marilyn Tyson. After one of Appellant's visits in late September or early October, Ms. Tyson discovered that some of her jewelry was missing. She questioned Appellant about the jewelry but he denied any knowledge. He stated that he would try to find out what happened to the missing pieces. When Ms. Tyson subsequently informed Appellant that she would turn the information over to her insurance company and would make known to the police her suspicions of him, Appellant became upset and asked for more time to find out what happened to the jewelry. At a later date, Appellant told Ms. Tyson that he found out that the missing jewelry had been pawned to a jeweler and that the jeweler had been killed.

During the early part of October 1985, Appellant phoned Tracy Greggs and asked him to take him to meet the decedent to talk over some business. Greggs picked Appellant up at Ms. Tyson's home and drove him to the decedent's apartment. Appellant told Greggs that he had some rings which belonged to Ms. Tyson that he wanted to sell to Sarfaty. Appellant stated that he needed some money and had planned to rob Sarfaty and steal some of his jewelry, but as Sarfaty knew him he would also have to kill him. Appellant attempted to elicit Greggs' aid, but Greggs refused to participate. The decedent was found murdered a few days after this conversation.

On Saturday afternoon, October 12, 1985, Appellant and co-defendant Woodruff were together in a store in Quail Springs Mall. The two men were carrying cups of beer and appeared to be intoxicated. When they spilled the beer and vomited in the store, security was called to remove them. Woodruff initially refused to leave, announcing that he wanted to purchase a television. He told the clerk that they did not need any credit, that they had money. He and Appellant then emptied their pockets of quarters. The store clerk also testified that she saw what appeared to be a blood stain on Woodruff's pant leg. She said that he showed her a small cut on his hand.

Eventually, the men cooperated with the security personnel and were removed from the store. The quarters, estimated to be between $15.00 and $30.00 worth, but not counted, were scooped up in Appellant's baseball cap. Appellant and Woodruff were retained in a holding cell until they could be turned over to the Oklahoma City Police Department. A lock blade knife was removed from one of them.

Under a charge of disorderly conduct and public intoxication, the men were transferred to the Detox Center. All of their personal belongings were sent with them. Procedures for booking a person into the Detox Center were more relaxed than those used in the county jail. Although razors directly removed from him, a knife and two pens were listed as property checked by Romano. Both men refused to check any money or jewelry.

Denise Howe, Woodruff's girlfriend, subsequently picked up Appellant and Woodruff at the Center. Under their direction she drove them back to Quail Springs Mall to retrieve Woodruff's car. She observed numerous small "diamond" papers (papers used to wrap diamonds and other small stones) surrounding the car. Ms. Howe testified that the following day she saw Woodruff with some gold jewelry she had not seen previously. She described the jewelry, a necklace and five or six rings, as looking old and tarnished. She said that Woodruff did not have the money to purchase the jewelry. Woodruff subsequently mailed the jewelry to a friend in California.

On October 16, 1985, at the residence shared with Ms. Howe, Woodruff received a phone call from the Enid Community Treatment Center. He and Ms. Howe subsequently drove out to the May Ridge Apartments. The sight of numerous police cars made Appellant nervous and fidgety and the two turned around and drove home.

Denise Howe further testified to receiving a phone call from Woodruff, after he had been taken into custody, to "clear out" the house". In response to such request she removed pieces of rope, a watch and a pair of gloves. These items were later turned over to the police. A portion of the rope was tied in a fashion known as a garotte. The medical examiner testified that the width of the rope was consistent with the ligature marks found on the decedent.

This Court has held repeatedly that the jury is the exclusive judge of the weight of the evidence and the credibility of the witnesses testimony. *Hollan v. State*, 677 P.2d 861, 864 (Okl.Cr.1984); *Isom v. State*, 646 P.2d 1288, 1292 (Okl.Cr.1982). A

though there may be conflict in the testimony, if there is competent evidence to support the jury's finding, this Court will not disturb the verdict on appeal. *Enoch v. State*, 495 P.2d 411, 412 (Okl.Cr.1972). A reviewing court must accept all reasons, inferences and credibility choices that tend to support the verdict. *See Washington v. State*, 729 P.2d 509, 510 (Okl.Cr.1986).

Here the jury found sufficient evidence of guilt although Appellant thoroughly cross-examined the State's witnesses, successfully drawing attention to certain inconsistencies; placed before the jury names of several other persons who could have been responsible for the decedent's murder; and presented a witness who stated that he saw the decedent Sunday morning, the day after the State theorized the decedent was killed. In our review of the evidence, we find that sufficient evidence of guilt was presented to support the jury's findings and that such evidence satisfies the "reasonable hypothesis" test, demonstrating more than a suspicion of guilt. Therefore, we refuse to interfere with the jury's verdicts of guilt and this assignment of error is denied.

[15] In his third assignment of error Appellant contends that he was denied a fair trial by prosecutorial misconduct. Appellant has specified approximately fourteen (14) instances during first stage closing argument arguing that the prosecutor deliberately misrepresented the evidence, vouched for the credibility of prosecution witnesses, denigrated defense witnesses, elicited sympathy for the victim and aligned himself with the jury. Ten (10) of these remarks were met with objections by the defense. Two (2) of these objections were sustained while the rest were overruled. In three (3) instances the jury was admonished to rely on its own memory of the evidence. We have carefully reviewed each of the allegations and find that the complained of remarks did not affect the outcome of this trial and that they neither separately nor cumulatively warrant modification or reversal.

It is well established that prosecutors are entitled to fully discuss the evidence from their standpoint, drawing all logical inferences and deductions arising from that evidence. *Holt v. State*, 628 P.2d 1170, 1171 (Okl.Cr.1981); *Glidewell v. State*, 626 P.2d 1351, 1353 (Okl.Cr.1981). We recognize, as did the United States Supreme Court in *United States v. Young*, 470 U.S. 1, 10, 105 S.Ct. 1038, 1043, 84 L.Ed.2d 1, 9 (1985), that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be prejudicial to the accused." However, "... a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Id.*, 470 U.S. at 11, 105 S.Ct. at 1044, 84 L.Ed.2d at 11. This Court has held that in order for the remarks of the prosecuting attorney to constitute reversible error they must be flagrant and of such a nature as to be prejudicial to the defendant. *Collins v. State*, 758 P.2d 340, 341 (Okl.Cr.1988); *Wimberli v. State*, 536 P.2d 945, 952 (Okl.Cr.1975). From a practical standpoint, every slight excess by the prosecutor does not require that a verdict be overturned and that a new trial be ordered. *Aiuppa v. United States*, 393 F.2d 597 (10th Cir.1968).

While some of the remarks, taken singly, exceeded the bounds of fair argument, the prosecutor's comments, when read in context, did not deprive Appellant of a fair trial. The record reveals no showing of a bad faith attempt to prejudice the jury nor an intentional emphasis upon collateral matters. Many of the complained of remarks came during the second portion of the closing argument, in reply to Appellant's closing argument. As we are not persuaded that the challenged remarks seriously affected the fairness of the trial, this assignment of error is denied.

[16] In his fourth assignment of error Appellant asserts that the trial court infringed upon his constitutional rights to confront the witnesses against him and to present witnesses in his defense by preventing him from eliciting relevant evi-

nt, drawing all logical infer-uctions arising from that evi-. *State*, 628 P.2d 1170, 1171 G[illegible]well v. State, 626 P.2d d.[illegible] 981). We recognize, as d States Supreme Court in v. *Young*, 470 U.S. 1, 10, 105 3, 84 L.Ed.2d 1, 9 (1985), that f argument, counsel do occa-remarks that are not justi-estimony, and which are, or dicial to the accused." How-riminal conviction is not to be rned on the basis of a prose-ents standing alone, for the conduct must be viewed in by so doing can it be deter-r the prosecutor's conduct af-irness of the trial." *Id.*, 470 5 S.Ct. at 1044, 84 L.Ed.2d at irt has held that in order for f the prosecuting attorney to versible error they must be of such a nature as to be the defendant. *Collins v.* P.2d 340, 341 (Okl.Cr.1988); *State*, 536 P.2d 945, 952 (Okl. om a practical standpoint, ev-cess by the prosecutor does that a verdict be overturned w[illegible] be ordered. *Aiuppa v.* s, 3[illegible] F.2d 597 (10th Cir.1968).

of the remarks, taken singly, bounds of fair argument, the comments, when read in con-deprive Appellant of a fair cord reveals no showing of a empt to prejudice the jury nor al emphasis upon collateral ny of the complained of re-during the second portion of argument, in reply to Appel-argument. As we are not at the challenged remarks ser-d the fairness of the trial, this f error is denied.

is fourth assignment of error serts that the trial court in-his constitutional rights to witnesses against him and to esses in his defense by pre-from eliciting relevant evi-

dence indicating the involvement of others in the crimes charged.

During the course of the trial it became evident that the theory of defense was that of innocence and that someone other than the Appellant was responsible for the murder. Appellant's attempts to introduce evidence of the involvement of T.R. Ballard, Kathy Ford and Susan Babbit were frequently met with objections by the State; objections which the trial court sustained. Questions concerning the relevancy of particular evidence are within the discretion of the trial court. *Fitchen v. State*, 738 P.2d 177, 180 (Okl.Cr.1987). A determination that the evidence should be excluded as irrelevant should be affirmed unless there is a clear showing of abuse accompanied by prejudice. *Klinekole v. State*, 705 P.2d 179, 184 (Okl.Cr.1985).

[17] In *Quinn v. State*, 55 Okl.Cr. 116, 25 P.2d 711 (1933), this Court held that evidence offered to show that some other person committed the crime charged must connect such other person with the fact; that is some overt act on the part of another towards the commission of the crime itself. There must be evidence of acts or circumstances that tend clearly to point to another, rather than the accused. *See also Case v. State*, 555 P.2d 619, 623 (Okl.Cr. 1976). We addressed this issue again in *Tahdooahnippah v. State*, 610 P.2d 808, 810 (Okl.Cr.1980), and stated that it was not enough to show a possible motive on the part of another; the evidence must show an overt act by the third person toward the commission of a crime.

[18] Appellant attempted to interject evidence that the decedent was involved with prostitutes, one of which was Susan Babbitt. Babbitt's name was brought up during the cross-examination of Detective Sealy. He testified that a Susan Babbitt was located but the police were unable to connect her with the Appellant, other than as an acquaintance from the Celebrity Club. Sealy stated that his investigation revealed that she was not the decedent's girlfriend and that no connection could be drawn between Ms. Babbitt and Kathy Ford.

[19, 20] Much of the evidence Appellant wanted to introduce about Kathy Ford came in either over the State's objection or with no objection from the State. Detective Sealy testified on cross-examination that the name Kathy Ford had come up in the investigation into the murder; however, they were not able to verify any actual person known to be Kathy Ford. An offer of proof was made by Appellant that, if permitted, Detective Sealy would testify that the name Kathy Ford came up several times as having possibly set the decedent up and robbed him.

During his case in chief, Appellant established that the decedent had last been seen by a neighbor arguing with a blonde headed woman. Evidence was also introduced to show that a knife had been sold to a person who gave her name as Kathy Ford. As with Susan Babbitt, none of the evidence presented or included in the offers of proof connected Ford with the commission of the murder. Appellant was also able to place before the jury substantial evidence of T.R. Ballard. However, evidence that Ballard knew the decedent from frequenting the same pool hall, that Ballard was destitute before the decedent's death, but seen with cash and jewelry after the murder, shows no overt act by him in the commission of the murder.

An offer of proof was made that Ballard's name was mentioned frequently in police reports. Defense counsel stated that, if permitted, Tom Farris would testify that Ballard and the decedent had business dealings and that the decedent had some problems with Ballard. When the court inquired into what the problems were and whether threats had been made defense counsel did not specifically respond to the court's inquiry but stated that the evidence was offered to show motive and opportunity. It was also stated that a witness testified as to Ballard's having slapped the decedent at some point in time. The court sustained the State's objection and informed the defense that the evidence could come in during the testimony of the witness who made the statement. No such testimony was ever offered. Without that

testimony or further evidence showing some act by Ballard in furtherance of the murder, we find the trial court properly ruled that further evidence was not relevant.

[21] Appellant contends in his fifth assignment of error that the trial court erred in admitting prejudicial hearsay testimony from prosecution witness Jerry Jones. Mr. Jones testified to a conversation he had with several men, including Appellant, at a pool hall in Oklahoma City on October 12, 1985. Appellant specifically objects to Jones' testimony that it was common knowledge around the pool hall which he and Appellant frequented that the decedent was murdered on a Saturday and that the body had been discovered on a Monday or Tuesday. Appellant's objection was overruled and Jones was permitted to testify further that the above information was common knowledge because the owner of the pool hall had an acquaintance who was a medical examiner.

Appellant argues that Jones' third hand information was clearly hearsay for which no exception exists and was not admissible for any purpose. We disagree. In *Williams v. State*, 542 P.2d 554 (Okl.Cr. 1975), *vacated on other grounds, Williams v. Oklahoma*, 428 U.S. 907, 96 S.Ct. 3218, 49 L.Ed.2d 1215 (1976) we stated:

> ... The clearest case of hearsay is where a witness testifies to the declaration of another for the purpose of proving the facts asserted by the declarant. The hearsay rule, however, does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. It does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or falsity, such evidence is admissible as a verbal act.... (Footnotes omitted)

542 P.2d at 574.

See also Nunley v. State, 660 P.2d 1052, 1055 (Okl.Cr.1983); *Garcia v. State*, 639 P.2d 88, 89 (Okl.Cr.1981); *Godwin v.* 625 P.2d 1262, 1265 (Okl.Cr.1981).

The information to which Jones te was knowledge which he acquired result of a general conversation wit pellant and others at the pool hall abo death of Roger Sarfaty. The testi was not offered to prove the truth matter asserted, that the decedent h fact been killed on Saturday and tha body was not found until Tuesday. er, it was offered to show that those i pool hall, including Appellant and J had talked about Sarfaty's death; as dation for Appellant's statement to J and as the basis for Jones' observati Appellant's demeanor. Therefore, as testimony was not hearsay, Appell contention is denied.

[22] In his sixth assignment of Appellant complains that two pieces of retrieved from the home shared by W ruff and Denise Howe were improperly mitted into evidence. He argues that State failed to show the relevance of rope by connecting it to the crime. general rule regarding demonstrative dence is that it is admissible if it is rele and the probative value of the evid outweighs the prejudicial effect. *Shek State*, 644 P.2d 560, 562 (Okl.Cr.1982), O.S.1981, §§ 2402, 2403. Admission weapon in a murder case is proper significant evidence exists from whic reasonable inference can be drawn that weapon was used by the defendant to c mit the crime." *Pannell v. State*, 640 P 568, 571 (Okl.Cr.1982). On appeal, the den of establishing prejudice from the mission of incompetent evidence is u the defendant. *Moser v. State*, 509 P 184, 185 (Okl.Cr.1973).

[23] In this case, the rope was recei by the police from Denise Howe. She t the rope out of the closet shared w Woodruff at his request to "clear out t house." One of the pieces of rope was t in a garrotte. Testimony established tha rope tied in this manner could be used a strangulation device. The rope was exa ined by the medical examiner and found

(Okl.Cr.1981); *Godwin v. State*, 262, 1265 (Okl.Cr.1981).

mation to which Jones testified ed which he acquired as a g ral conversation with Ap others at the pool hall about the loger Sarfaty. The testimony fered to prove the truth of the erted, that the decedent had in illed on Saturday and that the ot found until Tuesday. Rath ffered to show that those in the including Appellant and Jones, about Sarfaty's death; as foun Appellant's statement to Jones; basis for Jones' observation of demeanor. Therefore, as the was not hearsay, Appellant's is denied.

his sixth assignment of error omplains that two pieces of rope om the home shared by Wood enise Howe were improperly ad evidence. He argues that the l to show the relevance of the nnecting it to the crime. The le regarding demonstrative evi it it is admissible if it is relevant obative value of the evidence he judicial effect. *Sheker v.* P. 560, 562 (Okl.Cr.1982), 12 § 2402, 2403. Admission of a a murder case is proper "if evidence exists from which a inference can be drawn that the s used by the defendant to com ne." *Pannell v. State*, 640 P.2d kl.Cr.1982). On appeal, the bur blishing prejudice from the ad incompetent evidence is upon ant. *Moser v. State*, 509 P.2d)kl.Cr.1973).

this case, the rope was received e from Denise Howe. She took ut of the closet shared with at his request to "clear out the he of the pieces of rope was tied e. Testimony established that a this manner could be used as a n device. The rope was exam medical examiner and found to

be consistent with the size and weight of rope which left the ligature marks on the decedent's body. The pattern of bruising on the decedent's neck was particularly unique and probative of the manner in which the rope was used. The way in which the rope was tied was compatible with the type of bruising which resulted. This Court has long held that in order to be relevant, the evidence need not conclusively, even directly, establish the defendant's guilt. Any legal evidence from which the jury may adduce the guilt or innocence of the defendant is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue. *Ashlock v. State*, 669 P.2d 308, 310 (Okl.Cr.1983), *Fahay v. State*, 288 P.2d 757, 760 (Okl.Cr. 1955). See also, 12 O.S.1981, § 2401.

The rope was relevant to the case in allowing the jury to visualize one of the weapons used in the attack. We find that the State sufficiently connected the rope to the crime and to the Appellant to permit its proper introduction into evidence. Accordingly, this assignment of error is denied.

[24] Further, Appellant finds error in the opinion testimony of Detective Mullinex that the rope was tied in a garrotte and in the demonstration of how it could be used as a weapon. The testimony was properly admitted under 12 O.S.1981, § 2702 as that of an expert. Under section 2702 expert opinion testimony is admissible if it is based upon specialized knowledge unavailable to the layman and if it will assist the trier of fact in making a decision.

Detective Mullinex was not originally assigned to Appellant's case but was the chief investigator by August 1986, when Denise Howe turned over the rope to the police. He subsequently submitted it to the forensics lab for analysis. His opinion that the rope was tied in a manner known as a garrotte and that a garrotte could be used as a strangulation device was based upon his personal knowledge. As a police officer he was certainly more familiar with the uses of a rope as a weapon than the general public. See *Farris v. State*, 670 P.2d 995, 997 (Okl.Cr.1983), *Harrell v. State*, 395 P.2d 331 (Okl.Cr.1964).

Further, the rope was a critical piece of evidence. The manner in which it was tied required an explanation. The opinion of Detective Mullinex was highly probative of the determination of whether or not the rope was used as a murder weapon. As such we find that the testimony met the requirements of Section 2702 and there was no error in admitting this testimony. *See Green v. State*, 713 P.2d 1032, 1039 (Okl.Cr.1985), *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986).

[25] Detective Mullinex also demonstrated, over the objection of defense counsel, the use of the garrotte. It was placed around the neck of an Assistant District Attorney with the gap in the back where the two ropes were pulled together pointed out to the jury. Appellant argues it was error for the trial court to permit the demonstration.

The demonstration in the present case does not compare to that in two cases cited by the Appellant *Ford v. State*, 719 P.2d 457 (Okl.Cr.1986), and *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982). In *Ford* we condemned the prosecutor's conduct of demanding that the defendant pick up the gun used in the homicide and show the jury how it was used. While in *Brewer* we found the defendant was prejudiced during the prosecutor's cross-examination of the defendant's expert witness on insanity by stabbing a picture of the decedent with the knife allegedly used to commit the murder. In both cases the prosecutor's conduct was found to be prejudicial theatrics which went entirely outside the record and had no probative value.

The demonstration here is similar to that discussed in two cases cited by the State. In *State v. Sutherland*, 24 Wash.App. 719, 604 P.2d 957 (1979), *rev'd on other grounds*, 94 Wash.2d 527, 617 P.2d 1010 (1980), and *State v. Rich*, 395 A.2d 1123, 1131 (Me.1978), demonstrations of weapons for illustrative purposes were upheld. Although the defendant was not placed in actual possession of the weapon used in either case, the demonstrations were found relevant and helpful to the jury. In *Sutherland* the evidence established that the

defendant had purchased a .38 caliber Smith and Wesson revolver, a weapon which could produce the precise physical characteristics found on the bullets removed from the decedent and examined by the ballistics expert. The evidence also showed an absence of any record of the transfer of that weapon until the time of the decedent's death.

In *Rich* the evidence showed that the murder weapon was a pengun. The defendant owned and carried a pengun which he threw into the water off the wharf shortly after the murder took place. The exhibition of a pengun to the jury, similar to the one owned by the defendant and of a type unknown to the general public, was upheld as the unique physical makeup aided in explaining to the jury its construction and use.

In the present case, the rope was removed by the co-defendant's girlfriend, at his request, from a closet shared by the two. The physical characteristics of the rope were consistent with the marks left on the decedent's body. Contrary to Appellant's assertion, the general public is not familiar with the use of a garrotte or the process of strangulation. Because of the specific configuration in which the rope was tied, the demonstration was highly informative.

Further, we do not find the demonstration "grandstanding" as Appellant suggests, but an illustration of a use of the evidence which was helpful to the jury in deciding the issue before them. The brief demonstration was not so prejudicial as to outweigh the probative value of helping the jury understand how the rope could have been used. Appellant was able to thoroughly cross-examine Detective Mullinex as to his opinion and demonstration. Therefore, we find that the trial court did not abuse its discretion in permitting the demonstration. *See Palmer v. State*, 719 P.2d 1285, 1288 (Okl.Cr.1986). This assignment of error is denied.

IV. ISSUES RELATING TO PUNISHMENT

[26] Title 21 O.S.1981, § 701.11, provides in part that if a jury returns a verdict of death, "it shall designate in writing ... the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt." Appellant challenges the constitutionality of this section arguing that it mandates a general verdict with special findings of fact, a type of verdict prohibited by Art. 7, § 15 of the Oklahoma Constitution.

It is a well established rule of law that a legislative act is presumed to be constitutional. *Hilliary v. State*, 630 P.2d 791, 794 (Okl.Cr.1981); *White v. Coleman*, 475 P.2d 404, 405 (Okl.Cr.1970). Whenever reasonably possible statutes should be construed so as to uphold their constitutionality. *State v. Madden*, 562 P.2d 1177, 1179 (Okl.Cr.1977). The party attacking the constitutionality of the statute has the burden of proof. *Williamson v. State*, 463 P.2d 1004 (Okl.Cr.1969). When reviewing the constitutionality of a legislative act, we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but rather to see whether the act is prohibited. *Draper v. State*, 621 P.2d 1142, 1146 (Okl.1980).

[27] Title 21 O.S.1981, § 701.11 addresses the procedures to be followed during the sentencing stage of a capital murder trial. Appellant specifically challenges the constitutionality of the following portion of Section 701.11:

> ... the jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt.
>
> ....

Our state constitution does not address the role of the jury in sentencing a defendant convicted of a criminal offense. The constitution provides that "the right to trial by jury shall be and remain inviolate ..." Okl. Const. art. 2, § 19. And that "in all jury trials, the jury shall return a general verdict, and no law shall require a court to direct the jury to make findings of particu-

lar questions of fact, but the court may, in its discretion, direct such specific findings. *Id.*, art. 7, § 15. This language is unique to the Oklahoma Constitution. See *Smith v. Gizzi*, 564 P.2d 1009, 1013 (Okl.1977). Further, the provisions of Article 7, § 15, apply to "all jury trials" in the state of Oklahoma. Therefore, we must consider the application of this constitutional language by the Oklahoma Supreme Court.

The same type of legal argument was presented to the Oklahoma Supreme Court regarding the application of Oklahoma's Comparative Negligence Statutes as Appellant has presented here regarding the capital sentencing process. *See Smith v. Gizzi, Id.; Vaught v. Holland*, 554 P.2d 1174 (Okl.1976). In discussing the definitions of "general" and "special" verdicts the court stated:

> The jury under a special verdict is limited to the findings of specified facts and should not know the legal effect of its answers. Defendant is correct that in those states using a special verdict the court may create error by informing the jury of the effect of its answers. However, in Oklahoma, because our verdict must be general, this rule of law has no application. The jury not only must know the legal effect of its findings, but must determine the ultimate result, limited only by the special findings as to each parties degree of negligence. Such special findings are constitutionally and statutorily permitted. Under a general verdict, a jury must know the effect of its answers or it is not a general verdict. Under Oklahoma law the instruction was not error.
>
> A trial court in Oklahoma however, must be cautious in presenting a verdict form to the jury to insure that it is a general verdict. If the verdict is not wholly determinative of the right of recovery the verdict would be special. As long as a jury finds in favor of either plaintiff or defendant, special findings of fact will not deprive the verdict of its generality. 564 P.2d at 1013.

This interpretation is consistent with the legislative definition of the form of verdict in criminal cases set forth at 22 O.S.1981, § 914, which states "[a] general verdict upon a plea of not guilty, is either 'guilty', or 'not guilty', which imports a conviction or acquittal of the offense charged". The constitutional right to jury trials in Oklahoma relates only to the determination of guilt. Art. 2, § 19. Therefore, the provisions of Article 7, § 15, must be read and applied in that context. This interpretation is consistent with the provisions of Section 914. *Id.*

The law and procedure to be followed in sentencing an individual convicted of a criminal offense is found in the statutory provisions of Title 21 and 22, specifically in 22 O.S.1981, § 926 and 21 O.S.1981, § 701.10. Section 926 provides that in all cases of a verdict of conviction for any offense against the State of Oklahoma, the jury may, and shall upon the request of the defendant assess punishment. While Section 701.10, limited to convictions for first degree murder, provides for a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The challenged portion of Section 701.11 is merely further direction to the jury as to the procedure to be used in determining punishment. Designating the statutory aggravating circumstances found by the jury to support the death sentence does not constitute a verdict with special findings as the result of the jury's second stage deliberations is not a true "verdict". The "verdict" is a determination of the guilt or innocence of the accused, not the determination of the punishment to be imposed. See 22 O.S.1981, §§ 16 and 914.

We have thoroughly examined the Constitution and find no restraints prohibiting the Legislature from enacting statutory provisions governing the sentencing of defendants convicted of first degree murder. Based on the above analysis, we find, as did the Oklahoma Supreme Court in *Smith*, that the verdicts rendered in accordance with our capital sentencing procedure are general verdicts which comply with the requirements of Art. 7, § 15.

[28] During the second stage of trial, the State sought to prove four aggravating circumstances; 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the murder was especially heinous, atrocious or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Appellant contends that his death sentence should be modified to life imprisonment because at the time of Roger Sarfaty's murder, the aggravating circumstance "especially heinous, atrocious or cruel" was unconstitutionally vague. Roger Sarfaty was found murdered on October 16, 1985. In its 1988 decision of *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the aggravating circumstance of "especially heinous, atrocious or cruel" was constitutionally invalid as applied in that case because 1) the jury was not guided by language sufficient to bridle its discretion and 2) this Court did not cure any unbridled jury discretion by narrowing the application of the aggravating circumstance. 486 U.S. at 363–65, 108 S.Ct. at 1859.

This Court narrowed the interpretation of that particular aggravating circumstance in *Stouffer v. State*, 742 P.2d 562, 563 (Okl.Cr.1987) (Opinion on Rehearing), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988), to apply to instances of death preceded by torture or serious physical abuse. The judicially restricted interpretation was applied to a murder committed in 1985. In *Foster v. State*, 779 P.2d 591 (Okl.Cr.1989), we recognized that the problems underlying the reversal of Cartwright's death sentence stems from the fact that the jury was given incomplete instructions. The instructions did not address the limiting factors previously adopted and mandated by this Court for use with the aggravating circumstance "especially heinous and cruel.

The jury instruction given in the present case, both paragraphs of Oklahoma Uniform Jury Instructions—Criminal No. 436, embodies the limitations which the sentencer must consider in the application and finding of this particular aggravating circumstance. We have reexamined these principles on several occasions and have since consistently applied the narrow construction discussed above. *See Boltz v. State*, 806 P.2d 1117 (Okl.Cr.1991); *Moore v. State*, 788 P.2d 387, 401–402 (Okl.Cr.1990); *Fox*, 779 P.2d at 576; *Fowler v. State*, 779 P.2d 580, 588 (Okl.Cr.1989); *Nguyen v. State*, 769 P.2d 167, 174 (Okl.Cr.1988); *Rojem v. State*, 753 P.2d 359 (Okl.Cr.1988); *Hale v. State*, 750 P.2d 130, 142 (Okl.Cr.1988); *Mann v. State*, 749 P.2d 1151, 1160 (Okl.Cr.1988). Accordingly, we find that this particular aggravating circumstance was applied in a constitutional manner in the present case.

[29, 30] Appellant contends next that the State failed to prove beyond a reasonable doubt the murder was especially heinous, atrocious or cruel. Appellant argues that this particular aggravating circumstance must fall pursuant to our decision in *Brown v. State*, 753 P.2d 908 (Okl.Cr.1988), as the medical examiner was unable to state which of two potentially fatal wounds, the strangulation or stabbing, was inflicted first.

The evidence supporting a finding that the murder was especially heinous, atrocious or cruel requires proof that the death was preceded by torture or serious physical abuse. *Id.* Doctor Chai Choi, a forensic pathologist with the Office of the Chief Medical Examiner, testified that bruises and abrasions to the decedent's knees and elbows suggested that a struggle had taken place prior to the murder. Ligature marks on the decedent's wrists and ankles indicated that he had been forcefully restrained with his wrists and ankles bound. Injuries to the decedent's head showed that he had been struck approximately five times with a long blunt object, producing wounds consistent with those created by a baseball bat. She further testified that the cause of death was strangulation, a death which occurred only after three to five minutes of slow suffocation. Dr. Choi also testified that the decedent suffered five (5) stab wounds, two (2) of which were potentially fatal.

In *Brown*, we found insufficient evidence to support a finding that the murder was heinous, atrocious, or cruel as the medical examiner could not state which of the seven gunshot wounds was the fatal wound. This is clearly distinguishable from the present case wherein Dr. Choi testified that the injuries received by the decedent indicated that the strangulation preceded the stabbing. Although some of the bruising and lacerations to the arms and head occurred after the decedent's death, she unequivocally stated that the cause of death was suffocation caused by the strangulation.

When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, the proper test is whether there was any competent evidence to support the State's charge that the aggravating circumstance existed. In making this determination, this Court should view the evidence in the light most favorable to the State. *Brogie v. State*, 695 P.2d 538, 542 (Okl.Cr. 1985), *modified on other grounds*, 760 P.2d 1316 (Okl.Cr.1988).

When the evidence is considered in this light, we find it was clearly sufficient. Evidence that the decedent struggled with his assailants, was beaten with a blunt instrument several times and ultimately died of strangulation was sufficient to establish the requisite torture or serious physical abuse necessary to sustain the aggravating circumstance that the murder was heinous, atrocious or cruel. In making this determination, we have specifically excluded the stab wounds inflicted post-mortem. Accordingly, we find that Roger Sarfaty's murder was especially heinous, atrocious or cruel and that the jury's finding of this particular aggravating circumstance was based on substantial uncontradicted evidence.

[31] In his next assignment of error, Appellant alleges that the evidence was insufficient to prove that he killed the decedent for the purpose of avoiding or preventing lawful arrest or prosecution. The existence of this aggravating circumstance is determined by looking at the killer's intent. *Williamson v. State*, 812 P.2d 38 407 (Okl.Cr.1991). *Fox*, 779 P.2d at 57 *Fowler*, 779 P.2d at 588, *Stouffer v. Stat* 738 P.2d 1349, 1361–1362 (Okl.Cr.1987 *Moore v. State*, 736 P.2d 161, 165 (Okl.C 1987). In the absence of his own stat ments of intent, such evidence may be i ferred from circumstantial evidence. *R jem*, 753 P.2d at 368; *Banks*, 701 P.2d 426.

[32] Evidence presented by the Sta showed that Appellant knew Sarfat planned to rob him, and because Sarfa knew him, Appellant would have to kill hi to keep from being caught. We find th sufficient evidence from which a ration juror could have found beyond a reasonab doubt the existence of this aggravati circumstance.

[33] In his thirteenth assignment of e ror Appellant contends that the aggrav ting circumstance "continuing threat" mu be set aside and the death sentence vacat as the principles of double jeopardy a collateral estoppel bar the jury's finding this aggravator. At the time of the pr ent trial, Appellant and co-defendant Woo ruff had been previously tried by jury a convicted of the murder of Lloyd Thom son. During the Thompson trial, the Sta presented evidence of the Sarfaty homici in the second stage to support the aggrav ting circumstance that the defendants co stituted a continuing threat to society. T jury in that trial rejected that aggravat Appellant now argues that the State precluded from using that same evidence the instant case to determine whether A pellant constitutes a continuing threat society.

In *Ashe v. Swenson*, 397 U.S. 436, 4 90 S.Ct. 1189, 1193, 25 L.Ed.2d 469, (1970) the Supreme Court stated that c lateral estoppel "means simply that wh an issue of ultimate fact has once be determined by a valid and final judgme that issue cannot again be litigated tween the same parties in any future la suits." The Court held that collateral

toppel was not only a requirement of process, but was a part of the Fifth Amendment's guarantee against double jeopardy.

The Double Jeopardy prohibition constitutionally guaranteed by the Fifth Amendment to the United States Constitution and Article 2, § 21, of the Oklahoma Constitution applies only to an individual's right not to be placed twice in jeopardy for the same offense. While the doctrine of collateral estoppel, adopted by the Court in *Ashe*, is much broader and applies to the adjudication by a trier of fact that the accused was not the person who committed the acts comprising the charged offense or that the accused had not committed an essential element of a separate and distinct offense. The foundational question which must be answered in determining the applicability of collateral estoppel is whether there has been a prior adjudication by a trier of fact which in effect acquits the accused of the specific charged offense or an essential element of a separate and distinct offense. *See Ellis v. State*, 834 P.2d 985 (Okl.Cr. 1992); *White v. State*, 821 P.2d 378 (Okl. Cr.1991) (Lumpkin, J. concurring in results).

In *Buckaloo v. State*, 650 P.2d 885 (Okl. Cr.1982), the State sought to enhance the defendant's punishment for second degree burglary with three prior felony convictions. The jury declined to find the defendant guilty of the former convictions. Subsequently, the defendant was charged and tried for first degree robbery. At the robbery trial, the State again sought to enhance punishment with the same three felony convictions used in the prior trial. The defendant argued that the previous jury's refusal to find him guilty of the former convictions estopped the State from using the same three convictions for enhancement purposes in all subsequent prosecutions.

This Court disagreed with the defendant's argument stating that the determination of punishment in one case, using the facts of another case, is not a decision of ultimate fact in the cases used for enhancement. Quoting *Jordan v. State*, 327 P.2d 712 (Okl.Cr.1958), we said that providing enhanced punishment for second and subsequent offenses does not create or define a new or independent crime, but describes circumstances where one found guilty of a specific crime may be more severely penalized because of his previous conviction. 650 P.2d at 887. In *Johnson v. District Court of Oklahoma County*, 653 P.2d 215, 219 (Okl.Cr.1982) we stated:

> Furthermore, during the sentencing stage of a capital case, the court or jury may consider relevant evidence that might not otherwise be admissible at trial, i.e.; evidence of other crimes, and prior convictions. There must be due process limitations on the introduction of this evidence during the sentencing stage. However, the consideration of this evidence does not constitute double jeopardy. The defendant is not being punished a second time for the same offense; instead, the evidence is used to establish the defendant's character and criminal propensities which may justify the imposition of the death penalty. 653 P.2d at 218–219.

Based upon the foregoing, we find that the use of evidence of the Sarfaty homicide to prove "continuing threat" was not prohibited under the doctrine of collateral estoppel. The jury's consideration of the evidence of Sarfaty's murder during the second stage of the Thompson trial was not a final decision on the ultimate issue of Appellant's guilt or innocence of Sarfaty's murder. As we stated in *Johnson*, "To find otherwise, would abrogate the legislative intent to hold a defendant responsible for his separate and distinct acts of criminal misconduct." 653 P.2d at 219. This assignment of error is therefore denied.

[34] In his fourteenth assignment of error Appellant challenges the application of the aggravating circumstance of "continuing threat" arguing that the circumstance is unconstitutionally vague as applied and that the instructions given to the jury failed to adequately channel the sentencer's discretion. Appellant has properly preserved this issue for appellate review as he submitted two (2) proposed jury instructions to the court.[4]

However, we have previously analyzed and upheld this aggravating circumstance finding it specific, not vague, and readily understandable. *Boltz*, 806 P.2d at 1125; *Munson v. State*, 758 P.2d 324, 335 (Okl. Cr.1988); *Liles v. State*, 702 P.2d 1025, 1031 (Okl.Cr.1985); *VanWoundenberg v. State*, 720 P.2d 328, 336 (Okl.Cr.1986), *cert. denied*, 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986).

We are not now persuaded to alter that position. Accordingly, this assignment of error is denied.

[35] In his fifteenth assignment of error Appellant contends that the trial court erred in admitting any evidence of his conviction for the Thompson murder as it was not a final conviction and was then pending on appeal. To prove the aggravating circumstance of "continuing threat" the State presented evidence of the Thompson murder, specifically testimony by Thompson's neighbor concerning her observations the day of the homicide, the autopsy report reflecting the pathological diagnoses of the victim and photographs and fingerprints showing that the defendant in that case was in fact the Appellant. The fact that Appellant's conviction for this murder was not final does not affect the admissibility of evidence of the offense. In *Johnson v. State*, 665 P.2d 815, 822 (Okl.Cr.1982), this Court held:

> Evidence of a defendant's criminal record, or prior unadjudicated acts of violent conduct is relevant to the determination of whether the defendant is likely to commit future acts of violence that would constitute a continuing threat to society.... It is not necessary there be a final conviction for an unrelated criminal offense to be admissible at the sentencing stage.

See also *VanWoundenberg v. State*, 720 P.2d at 337.

[36] Our decision is not altered by the fact that Appellant's conviction for the Thompson homicide has been reversed and remanded for a new trial. See *Romano v. State*, 827 P.2d 1335 (Okl.Cr.1992). As the case was not reversed on the basis of insufficient evidence of guilt, the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence. Contrary to Appellant's argument, this decision is not violative of the dictates of *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), wherein the Supreme Court specifically declined to review the possible relevance of the conduct giving rise to the prior conviction which had been set aside as no evidence describing that conduct had been presented to the jury.

[37] However, the same cannot be said of the judgment and sentence and docket sheet from the Thompson case. This evidence was admitted to show that a prior conviction had been obtained and that it was not final but on appeal. As that prior conviction has fallen, the judgment and sentence is no longer proper support for the "prior violent felony" aggravating circumstance. Therefore, this aggravator falls.

[38] In his seventeenth assignment of error Appellant argues that he is entitled to a modification of his sentence should one aggravator fall because this Court's practice of reweighing aggravating circumstances versus mitigating evidence usurps the jury's function. Specifically, he argues that reweighing is unconstitutional because it deprives the defendant of the right to be sentenced by a jury of his peers and applied to this case would be a violation of the prohibition against *ex post facto* laws. This argument has previously been rejected in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

In *Castro v. State*, 749 P.2d 1146, 1148 (Okl.Cr.1987) *cert. denied*, 485 U.S. 971,

4. Defendant's proposed Instruction No. 13 defined the term "society" and proposed Instruction No. 18 instructed the jury to look to the Appellant's background, psychological studies and demeanor at trial to see if there were indicators that would support the circumstance. (O.R. 272, 278)

108 S.Ct. 1248, 99 L.Ed.2d 446 (1988) we determined that the potential reevaluation of the defendant's sentence during direct appeal proceedings does not encroach upon his right to jury sentencing and permits this Court to affirm the death sentence even if one aggravating circumstance fails. Although the capital sentencing statutory scheme does provide for jury sentencing, it also provides for sentence review by the Court and for review by the state district court and this Court through post-conviction procedures. 21 O.S.Supp.1985, § 701.13; 22 O.S.1981, § 1080 *et seq.* The *ex post facto* claim was also specifically rejected in *Castro*, as we stated that reweighing the aggravating circumstances against the mitigating evidence was procedural and does not criminalize innocent conduct nor increase the crime. 749 P.2d at 1150–1151. Accordingly, this assignment of error is denied.

[39] Appellant further argues that sentence of death is unreliable because the jury's sense of responsibility was diminished by acts of the trial court and the prosecutor. Specifically, Appellant directs our attention to the trial court's direction to the jury during voir dire that their function was to recommend punishment, the fact that reflected in the judgment and sentence for the Thompson murder was Appellant's sentence of death, and a comment by the prosecutor during closing argument to "put the defendant on death row".

"The jury has the prime responsibility for deciding whether the death penalty should be imposed. We must be cautious to avoid any actions or directions which would tend to reduce the jurors' sense of responsibility for their decision. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court stated that the constitution prohibits imposition of a death penalty which rests on a "determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 472 U.S. at 328–329, 105 S.Ct. at 2639. No such misconception exists on this record. During voir dire, the trial court asked each prospective juror in part: "If you find beyond a reasonable doubt that the Defendants are guilty of Murder in the first degree, your duty is to determine whether or not, considering the evidence, you should recommend death."

We find no error as this is a proper statement of the law. See 22 O.S.1981, § 961 *et seq.*, § 1001 *et seq.* Further, in light of the explicit instructions given during second stage, nothing in the court's conduct can be said to have diverted the jury from its "awesome responsibility." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.

Learning that the defendant had previously received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of their decision. However, when the jury is properly instructed as to its role and responsibility in making such a determination we cannot, on appellate review, conclude that the jury in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise.

In the present case, the importance of the jury's role at sentencing is evident from the instructions. The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. They were informed of their role as factfinders, that the weight and value of testimony and evidence was for them to determine, that they should not surrender their own judgment to that of any witness or item of evidence, and of their duty to follow the law in reaching their conclusion. It was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence.

ve juror in part: "If you find beeasonable doubt that the Defen- guilty of Murder in the first ou ty is to determine whether nsidering the evidence, you should id death."

d no error as this is a proper of the law. See 22 O.S.1981, *seq.*, § 1001 *et seq.* Further, in he explicit instructions given dur- id stage, nothing in the court's an be said to have diverted the n its "awesome responsibility." 472 U.S. at 330, 105 S.Ct. at

g that the defendant had previeived a death sentence for another ould diminish the jury's sense of e of its role and mitigate the con- of their decision. However, jury is properly instructed as to id responsibility in making such a tion we cannot, on appellate reclude that the jury in any way e responsibility for their decision red their decision any less signifithey would otherwise.

present case, the importance of s at sentencing is evident instructions. The jury was in- that it had the responsibility for g whether the death penalty imposed. They were informed of as factfinders, that the weight of testimony and evidence was o determine, that they should not their own judgment to that of ss or item of evidence, and of to follow the law in reaching lusion. It was never conveyed or in any way, by the court or the that the jury could shift its re- y in sentencing or that its role in ad been minimized. The instruc- n to the jury provided sufficient as to how their judgment should sed. In this light, it is highly hat the jury's sense of responsi- ld have been diminished based wledge of the prior imposition of sentence.

The "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Reviewing the sentencing determination in the present case under this heightened standard, but also with a presumption of correctness, we find no reason to question the jury's conclusion. While evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense, the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process.

Further, the prosecutor's request of the jury to put the defendants on death row is not violative of the *Caldwell* rule. This brief remark was simply a way of asking the jury to impose the death penalty. We do not find that this comment in any way lead the jury to believe that the ultimate responsibility for the defendants' fate rested elsewhere. Accordingly, this assignment of error is denied.

[40, 41] Appellant offered evidence in mitigation of his completion of numerous bible study courses and the testimony of the jail's chaplain concerning his religious accomplishments. On re-direct examination, defense counsel asked Helen Pearce, Assistant Chaplain in the Oklahoma County Jail, if she felt that Appellant was involved in "jailhouse religion" or if she felt it was something more. The prosecutor's objection was sustained. Appellant now objects to that ruling, to the use of the term "jailhouse religion" in the prosecutor's closing argument, and to jury instructions which directed consideration of aggravating circumstances in mandatory terms but consideration of mitigating evidence in permissive terms.

Initially, we find that the trial court properly precluded Ms. Pearce from giving her personal opinion as to Appellant's religious commitment. Such testimony called for mere speculation on the part of the witne and was not helpful to a clear understan ing of the issue. See 12 O.S.1981, § 270 Further, we find no error in the prosecut use of the term "jailhouse religion" duri closing argument. The comments in t State's closing argument were reasonab inferences based upon the term as broug up during the testimony of Ms. Pearc Moreover, the remark was not met with objection by the defense during closing gument.

[42] Further, the jury was not preven ed from considering any relevant mitiga ing evidence. Instruction No. 9 informe the jury that "mitigating circumstances a those, which in fairness and mercy, may considered as extenuating or reducing t degree of moral culpability or blame." T jury was further told that the determin tion of what was mitigating evidence w for them to determine. Instruction No. provided a list seventeen (17) specific iten which the jury could consider as evidenc to mitigate Appellant's punishment. T jury was instructed that whether the list circumstances existed and whether the were mitigating evidence was their dec sion. The jury was also provided a list the aggravating circumstances which t State sought to prove against the Appe lant. Instruction No. 7 informed the ju that the defendant is presumed innocent the charges made in the Bill of Particula and it is the burden of the State to prov beyond a reasonable doubt the aggravatin circumstances alleged. Additional instru tions informed the jury that it could onl recommend a death sentence upon a unan mous finding of the existence beyond reasonable doubt of one or more aggrav ting circumstance or circumstances, an upon a unanimous finding that any suc aggravating circumstance or circumstance outweighed the finding of mitigating ci cumstances. 21 O.S.Supp.1987, § 701.1

We find that the instructions given in th present case do not direct the jury to disr gard any mitigating evidence. Rather, th instructions provide the fullest possible la itude for the consideration of evidence mitigation. The jury was not prohibited

any way from considering any and all relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). As the instructions given adequately apprised the jury of the method by which it should determine the sentence against the defendant, this assignment of error is denied.

[43] Appellant further alleges in his eighteenth assignment of error that the trial court erred in failing to instruct the jury that it had the option to return a life sentence regardless of its findings respecting aggravating and mitigating circumstances. Reviewing for fundamental error only as the Appellant failed to request such an instruction, we find no error warranting reversal or modification of sentence.

In *Walker v. State*, 723 P.2d 273, 284 (Okl.Cr.1986), the appellant claimed error in the refusal to give his requested instruction on "jury nullification". Defined as "the jury's exercise of its inherent 'power to bring in a verdict of [acquittal] in the teeth of both the law and facts' ", we found that most courts have uniformly held that a defendant is not entitled to such an instruction. *See also Williamson v. State*, 812 P.2d at 410. We find no error in the omission of this instruction.

[44] Appellant contends in his nineteenth assignment of error that the trial court erred in instructing the jury not to allow sympathy, sentiment or prejudice to enter into its deliberations. This argument was rejected in *Fox v. State*, 779 P.2d at 574-575. We are not persuaded to deter from that position. *See also Williamson*, 812 P.2d at 408; *Moore v. State*, 788 P.2d 387, 401 (Okl.Cr.1990). Accordingly, this assignment of error is denied.

[45] In his twenty-first assignment of error Appellant alleges that the trial court failed to properly instruct the jury concerning the burden of proof and the manner in which to weigh the aggravating circumstances and mitigating evidence. Specific standards for balancing aggravating and mitigating circumstances are not constitutionally required. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See also Walker v. State*, 723 P.2d at 284; *Brogie v. State*, 695 P.2d at 544. The instructions given to the jury properly advised them to weigh the aggravating circumstances against the mitigating evidence. Instructions No. 8 through 12 comprehensively informed the jury that a finding of the aggravating circumstances beyond a reasonable doubt is not by itself enough to assess the death penalty. Rather, the aggravating circumstances must clearly outweigh the mitigating, or death may not be imposed. Similar instructions have passed constitutional muster. *See Davis v. State*, 665 P.2d 1186, 1202 (Okl.Cr.1983).

[46] Further, the trial court properly denied Appellant's requested instruction which placed a "beyond a reasonable doubt" standard on the ultimate life or death determination. In *Johnson v. State*, 731 P.2d 993 (Okl.Cr.1987), we held that the burden of proof analysis is not strictly applicable to the weighing process. Quoting to *Daniels v. State*, 453 N.E.2d 160 (Ind. 1983), we stated that while the State must prove beyond a reasonable doubt the existence of at least one of the enumerated aggravating circumstances, the determination of the weight to be accorded the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt. Instead, it is a balancing process. 731 P.2d at 1005.

[47] In his twenty-fourth assignment of error, Appellant contends that Oklahoma's death penalty statutes are unconstitutional as they allow unbridled prosecutorial discretion in seeking the death penalty. Appellant argues that, aside from the statutory aggravating circumstances, statutes provide no guidelines for determining when prosecutors should seek the death penalty. Because of the lack of adequate guidelines, Appellant continues, the decision whether or not to seek the death penalty will, and does to a great degree, depend on the whim of the individual prosecutor. A similar argument was raised in *Crumley v. State*, 815 P.2d 676 (Okl.Cr.1991). We preface our remarks here, as we did in *Crumley*, with the notation that we do not take allegations like these lightly, however. Appellant has provided nothing in support of his theory except unsubstantiated speculation.

The decision regarding which criminal charge to bring lies within the wide parameters of prosecutorial discretion. *Gray v. State*, 650 P.2d 880, 882 (Okl.Cr.1982). See also *Dangerfield v. State*, 742 P.2d 573 (Okl.Cr.1987). However, prosecutorial discretion is not unlimited. In *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978), the Supreme Court stated;

> the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.

Nor do we find such selectivity in itself to be a state constitutional violation. Limits on this discretion exist by virtue of the statutory schemes governing criminal law as well as those governing the practice of law. See *Ray v. State*, 510 P.2d 1395 (Okl.Cr.1973) (wherein this Court adopted the American Bar Association Standards for Criminal Justice). See also 5 O.S.1981, Ch. 1, App. 3, DR 7-103(A) and 5 O.S.Supp. 1988, Ch. 1, App. 3A, Rule 3.8. Rules of Professional Conduct (prohibiting a prosecutor from bringing charges unless supported by probable cause). Prosecutors are presumed by law to act in good faith when determining which crimes to prosecute and which punishments to seek. *United States v. Blitstein*, 626 F.2d 774 (10th Cir.1980); *United States v. Bennett*, 539 F.2d 45 (10th Cir.1976) *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976).

As the Tenth Circuit Court of Appeals stated in *Blitstein* "It is the obligation of a criminal defendant to demonstrate that the government's prosecution of him was based upon impermissible discriminatory grounds ..." *Id.* at 782. We find that in the present case, the Appellant has failed to make such a showing and that when the statutes and case law are considered together, sufficient guidelines exist to properly direct prosecutorial discretion in making the decision whether to seek the death penalty.

[48] Finally, Appellant argues that the one thousand year prison sentence for the Robbery is excessive. It is well settled that the question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rogers v. State*, 507 P.2d 589, 591 (Okl.Cr.1973). This Court does not have the power to modify a sentence unless we can conscientiously say that under all the facts and circumstances that the sentence is so excessive as to shock the conscience of the Court. *Huntley v. State*, 750 P.2d 1134, 1136 (Okl.Cr.1988).

Appellant's prior felony convictions and the violent manner in which the robbery was committed support the sentence. Accordingly, this assignment of error is denied.

V. MANDATORY SENTENCE REVIEW

Pursuant to 21 O.S.Supp.1987, § 701.13(C), we must determine (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of an aggravating circumstance as enumerated in 21 O.S.1981, § 701.12. As noted above, the aggravating circumstance of prior felony conviction involving the use or threat of violence has not been supported by the evidence and therefore falls. In *Stouffer v. State*, 742 P.2d at 564 this Court held that an independent reweighing of aggravating circumstances and mitigating evidence is implicit to our statutory duty to determine the factual substantiation of the verdict and the validity of the death sentence. See also *Battenfield*, 816 P.2d at 564; *Sellers*, 809 P.2d at 691; *Castro*, 7[illegible] P.2d 1146. In *Clemons*, 494 U.S. at 74[illegible] 751, 110 S.Ct. at 1449, the Supreme Court found nothing in appellate weighing or reweighing of the aggravating circumstance and mitigating evidence that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sen-

tence. The Court further stated that appellate courts are not hindered in performing this function without written jury findings concerning mitigating circumstances.

[49] We have already found the evidence sufficient to support the jury's finding of the other aggravating circumstances found by the jury, i.e. that the murder was especially heinous, atrocious or cruel; that the murder was committed to avoid lawful arrest or prosecution, and that the Appellant constitutes a continuing threat to society. Evidence in mitigation presented in this case consisted of testimony from Appellant's family members concerning Appellant's childhood, including the trauma experienced when he was fourteen by the divorce of his parents; the love and support of family and friends; his record of being a good worker; his status as a trustee in the county jail and role as problem solver; his completion of bible study courses and involvement in the jail ministry; and his prospects for rehabilitation.

Discarding the evidence supporting the "prior violent felony conviction" aggravating circumstance, and carefully weighing the remaining aggravating circumstances against the mitigating evidence presented at trial, we find the sentence of death to be factually substantiated and appropriate.

Finding no error warranting reversal or modification, the judgments and sentences for Robbery with a Dangerous Weapon, After Former Conviction of a Felony and First Degree Murder are AFFIRMED.

LANE, P.J., and JOHNSON, J., concur.

BRETT, J., not participating.

STATE of Oklahoma, Appellant,

v.

L.D.D., N.D.E., Appellees.

No. S-92-591.

Court of Criminal Appeals of Oklahom

Feb. 8, 1993

State sought to have juveniles w
were 16 and 17 years of age when th
were charged with attempted robbery w
a firearm treated as adults under rever
certification statute. Magistrate Rob
Perugino sustained juveniles' motion to d
miss and ordered case transferred to t
Juvenile Court. The District Court, J
Jennings, J., upheld magistrate's ruli
State appealed. The Court of Criminal A
peals held that: (1) juveniles could not a
tomatically be considered as adults aft
having been charged with that offens
which was not one of the enumerated o
fenses under reverse certification statut
(2) language in reverse certification statut
allowing persons who were 16 or 17 yea
of age to be considered as an adult whe
they were charged with "use of a firear
or other offensive weapon while commi
ting a felony" could not be used to certif
subject juveniles as adults, as charging la
guage in information did not indicate th
were alternatively charged with that speci
ic crime; and (3) state could seek to hav
juveniles certified as adults through certif
cation procedure provided in separate sta
ute.

Affirmed.

1. **Infants** ⇐68.6

Juveniles charged with attempted rob
bery with a firearm could not automatically
be considered as adults under reverse certi
fication statute, as that offense was no
one of the enumerated offenses thereun
der. 10 Okl.St.Ann. § 1104.2.

2. **Infants** ⇐68.5

Language in reverse certification sta
ute allowing person 16 or 17 years of ag
to be considered as an adult when they

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN JOSEPH ROMANO,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

APPENDIX "B"

Order Denying Petition for Rehearing and Directing Issuance of Mandate

Supreme Court of the United States

No. 92-9093

John Jospeh Romano,

Petitioner

v.

Oklahoma

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Oklahoma.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?"

November 1, 1993

ORIGINAL

Case No. 92-9093

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

JOHN JOSEPH ROMANO,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

SUSAN BRIMER LOVING
ATTORNEY GENERAL OF OKLAHOMA

A. DIANE BLALOCK
ASSISTANT ATTORNEY GENERAL
DEATH PENALTY UNIT

*SANDRA D. HOWARD
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

*Counsel of Record

INDEX

Page

SUBJECT INDEX

CASES CITED

STATUTES CITED

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to reconsider whether a sentencing stage error was harmless, when the Court of Criminal Appeals entered a finding that the error did not affect the jury's verdict.[1]

2. Whether this Court should substitute its judgment for that of the Court of Criminal Appeals regarding the extent an issue must be addressed on direct appeal.

---

[1]The State has combined the first two questions presented in the Petition for Writ of Certiorari in its first question presented. Thus, Petitioner's third question corresponds to the State's second question.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Oklahoma, by and through Susan Brimer Loving, Attorney General of the State of Oklahoma, respectfully requests that this Court deny issuance of a Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Criminal Appeals is recorded at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

Defendant is incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-87-397.

Defendant was convicted by a jury of his peers of the crime of Murder in the First Degree for his participation in the killing of Roger Sarfaty[2]. During the sentencing phase of defendant's trial, the jury found that there was a probability that the defendant constituted a continuing threat to society, that he had previously been convicted of a felony involving violence, that the murder was committed to avoid arrest or lawful prosecution, and that the murder was especially heinous, atrocious, or cruel. Having found the existence of four (4) of the aggravating circumstances necessary under 21 Okla.Stat. 1991, § 701.12 before a penalty of death can be imposed, the jury then assessed the death penalty. The trial court followed the recommendation of the jury. The defendant filed a direct appeal from his conviction, which was affirmed by the Oklahoma Court of Criminal Appeals at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992).[3] It is from that

[2]Petitioner had previously been convicted, in the same county, for another murder charge. That previous conviction, involving the death of LLoyd Thompson, is mentioned and involved in some of the issues presented here. Thus, references to the Sarfaty murder refer to the present case, and references to the Thompson murder refer to the prior conviction.

[3]On direct appeal, the "prior violent felony conviction" aggravator was stricken because that prior felony had been reversed on appeal, subsequent to the defendant's trial in this case. See Romano v. State, 827 P.2d 1335 (Okla. Crim. App. 1992)(the Thompson murder conviction, which was reversed because of improper joinder of the defendant and co-defendant's trials). After reweighing the

direct appeal decision that the petitioner now seeks certiorari review from this Court.

remaining aggravators against the mitigating evidence, the Court of Criminal Appeals upheld the sentence of death.

SUMMARY OF THE ARGUMENT

The Court of Criminal Appeals properly handled the sentencing stage error that occurred when the defendant's prior death sentence was revealed on a Judgment and Sentence introduced in aggravation.

The Court of Criminal Appeals ruled on all issues presented on direct appeal, no presented arguments were omitted.

REASONS FOR REFUSING TO GRANT THE WRIT

I.

THE COURT OF CRIMINAL APPEALS PROPERLY FOUND THAT THE MENTION OF A PRIOR DEATH SENTENCE DURING THE SENTENCING STAGE COULD NOT HAVE AFFECTED THE JURY'S SENTENCING DETERMINATION.

For his first two questions presented in his Petition for Writ of Certiorari the petitioner attacks the Court of Criminal Appeals' decisions, both in method and in the ultimate conclusion reached, regarding petitioner's claim that the jury in his case had their ultimate sense of responsibility for sentencing improperly diminished. As previously mentioned in a footnote above, the State has chosen to respond to these related allegations in one proposition, rather than two separate propositions.

In his direct appeal claim, the petitioner asserted that the jury's responsibility for sentencing was improperly diminished by three separate and distinct acts during the trial proceedings. In this Petition for Writ of Certiorari, petitioner has chosen to focus on only one of those three arguments presented. In the second or sentencing stage of petitioner's trial, a copy of a Judgment and Sentence reflecting petitioner's First Degree Murder conviction and consequent sentence of death for the Thompson murder was introduced in aggravation. Petitioner claims that this was error, and the admission of that fact improperly diminished his jury's responsibility for assessing the sentence in this case.

In deciding the issue on direct appeal, the Court of Criminal Appeals acknowledged this Court's holding in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)

and specifically found that petitioner's jury was not misled to believe that the responsibility for a determination of the appropriate sentence rested elsewhere. Romano, 847 P.2d at 390.

Acknowledging that it was possible that learning of a prior death sentence could diminish the jury's sense of its role, the Court of Criminal Appeals focused on the instructions given to the jury in this case.

> The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. They were informed of their role as factfinders, that the weight and value of testimony and evidence was for them to determine, that they should not surrender their own judgment to that of any witness or item of evidence, and of their duty to follow the law in reaching their conclusion. It was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence.

Romano, 847 P.2d at 391. The Court did not abandon the issue there, however, but continued its analysis using that "greater degree of scrutiny of the capital sentencing determination" specified by this Court in California v. Ramos, 463 U.S. 992, 998, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Under that "heightened standard" the Court again considered the fact of the mention of the Thompson death sentence in the sentencing stage here, and found:

> While evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense, **the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process.**

Romano, 847 P.2d at 391 (emphasis added). It is difficult to understand how the Court's analysis, above, does not meet with the constitutional standards set forth by this Court.

A similar issue was presented in State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (S.C. 1990) cert. denied Bell v. South Carolina, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990). However, in that case, unlike here, certain members of the defendant's jury panel had knowledge prior to the trial that the defendant had a prior conviction and death sentence. However, each of those jurors stated that they could set aside any previous impression or opinion and render a verdict based on the evidence presented in the courtroom. The South Carolina court stated:

> [W]e also reject Bell's argument that the jurors' knowledge of the previous death sentence diminished their sense of responsibility in deciding what sentence to impose. . . . We find that the reasoning of Caldwell does not control the case at bar. The jurors here disavowed themselves prior to their qualification of any bias or prejudice against the appellant, specifically with respect to his previous sentence of death.

Bell, 393 S.E.2d at 368.

The State respectfully submits that the Oklahoma appellate court's analysis of this issue, and its ultimate decision, was well

within constitutional parameters, and was consistent with the evidence and record on appeal.

This question does not present any issue for certiorari review.

II.

THE COURT OF CRIMINAL APPEALS ADDRESSED ALL "THREE" ISSUES WHICH PETITIONER NOW COMPLAINS WERE NOT FULLY ADDRESSED ON DIRECT APPEAL.

In the third question presented to this Court, the petitioner claims that the Oklahoma Court of Criminal Appeals failed to address "three" issues which were raised on direct appeal. "Two" of those "three" issues were raised by Mr. Romano himself in a supplemental pro se brief. The "third" issue was raised by counsel in a supplemental brief.

The first "two" issues, as identified by Petitioner,are "that the Stat was barred and/or estopped from prosecuting the Petitioner in the present case because the State had used the evidence of the Sarfaty homicide to obtain the death penalty in the Thompson homicide trial," and that "the court did not address the double jeopardy arguments concerning whether the Petitioner could be tried at all for the homicide of Sarfaty once the State used that evidence to secure a death sentence in another trial." Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals, p. 5.

The State must respectfully disagree. In its direct appeal opinion the Court of Criminal Appeals stated:

> Appellant contends that the aggravating circumstance "continuing threat" must be set aside and the death sentence vacated as the principles of double jeopardy and collateral estoppel bar the jury's finding of this aggravator. At the time of the present trial, Appellant and co-defendant Woodruff had been previously tried by jury and convicted of the murder of Lloyd Thompson. During the Thompson trial, the State presented evidence of the Sarfaty homicide in the second stage to support the aggravating circumstance that the defendants constituted a continuing threat to society. The jury in that trial rejected that aggravator. Appellant now argues that the State is precluded from using that same evidence in the instant case to determine whether Appellant constitutes a continuing threat to society.

Romano, 847 P.2d at 387 (bold emphasis). See also Woodruff v. State, 846 P.2d 1124, 1141 - 1143 (Okla. Crim. App. 1993) (petitioner's co-defendant) in which the Court stated the issue, thus:

> Appellant contends . . . that by presenting evidence of Sarfaty's murder during the Thompson trial, the State was collaterally estopped from bringing the instant prosecution.

Woodruff, 846 P.2d at 1141. In both this case and the co-defendant Woodruff's case, the Court of Criminal Appeals then went on to analyze the double jeopardy and collateral estoppel claims under the holdings of this Court in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) and that Court itself in Johnson v. District Court of Oklahoma County, 653 P.2d 215, 219 (Okla. Crim. App. 1982) wherein the Court of Criminal Appeals held that "the evidence of aggravating circumstances at the sentencing stage in a capital case does not establish an independent crime."

Ultimately, in the case at bar, the Court of Criminal Appeals concluded:

> The jury's consideration of the evidence of Sarfaty's murder during the second stage of the Thompson trial was not a final decision on the ultimate issue of Appellant's guilt or innocence of Sarfaty's murder.

Romano, 847 P.2d at 388. The State respectfully submits that the Court of Criminal Appeals properly considered the petitioner's double jeopardy and collateral estoppel claims.

The petitioner finally asserts that the Court of Criminal Appeals failed to address the claim regarding the sufficiency of the evidence to support the aggravating circumstance of continuing threat to society, when considering the effect of the reversal of the Thompson murder conviction. Of course, it is well settled that a crime need not even be adjudicated to be considered as evidence in support of this aggravating circumstance. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2960 (1976); Johnson v. State, 665 P.2d 827 (Okla. Crim. App. 1983). Thus, the State respectfully submits that there was no need for the Court to consider the effect of the vacation of the Thompson conviction on the continuing threat aggravator. The Thompson conviction was not vacated because of insufficiency of the evidence, but because of improper joinder. It was still good evidence to consider in support of this aggravating circumstance.

Furthermore, the Court did consider this issue, and found that "the fact that Appellant's conviction for [the Thompson] murder was not final does not affect the admissibility of evidence of this

offense," for the purpose of proving the continuing threat aggravator. The Court then held:

> Our decision is not altered by the fact that Appellant's conviction for the Thompson homicide has been reversed and remanded for a new trial. (Citation omitted). As the case was not reversed on the basis of insufficient evidence of guilt, the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence.

Romano, 847 P.2d at 389. The Court then found that the evidence was sufficient to support the continuing threat aggravator. Romano, 847 P.2d at 394.

The Court of Criminal Appeals properly considered all issues presented before it in the direct appeal proceedings. Petitioner's arguments do not present any basis for certiorari review.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

SUSAN BRIMER LOVING
ATTORNEY GENERAL OF OKLAHOMA

Sandra D Howard

SANDRA D. HOWARD OBA #11873
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921
ATTORNEYS FOR RESPONDENTS

No. 92-9093

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN JOSEPH ROMANO,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Sandra D. Howard, being first duly sworn, states:

1. That I am attorney of record in the above-styled case representing the State of Oklahoma and am a member of the Bar of this Court.

2. Pursuant to Rule 29.2 of the Rules of this Court, on July 23, 1993, at approximately 5:00 p.m. Central Standard Time, I caused to be placed 11 copies of the Respondent's Response to Petition for a Writ of Certiorari in a package properly addressed to the Clerk of this Court, with postage prepaid, and caused the package to be placed in the United States Mail in Oklahoma City, Oklahoma.

FURTHER AFFIANT SAYETH NOT.

Sandra D Howard
SANDRA D. HOWARD

Subscribed and sworn to before me this 23rd day of July, 1993.

Betty Jan Kennett
Notary Public

My Commission Expires:

3-1-95

No. 92-9093

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN JOSEPH ROMANO,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

CERTIFICATE OF SERVICE

I, Sandra D. Howard, a member of the Bar of this Court, hereby certifies that 1 copy of the foregoing was mailed by first-class, postage prepaid mail, to the counsel for Petitioner:

Ms. Lee Ann Jones Peters
Assistant Public Defender of Oklahoma County
320 Robert S. Kerr, Room 611
Oklahoma City, OK 73102

Sandra D. Howard
SANDRA D. HOWARD
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

Dated: July 23, 1993

No. 92-9093

In The

Supreme Court of the United States

October Term, 1993

JOHN JOSEPH ROMANO,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The
Court Of Criminal Appeals Of Oklahoma

JOINT APPENDIX

LEE ANN JONES PETERS*
Office of the Oklahoma
County Public Defender
320 Robert S. Kerr, Rm. 611
Oklahoma City, OK 73102
Telephone: (405) 278-1550
Counsel for Petitioner

A. DIANE BLALOCK
SANDRA D. HOWARD*
Office of the Attorney
General for the State
of Oklahoma
112 State Capitol Building
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed June 14, 1993
Certiorari Granted November 1, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	ENTRY
July 24, 1986	Petitioner was charged with the July 19, 1986 murder of Lloyd Thompson.
January 12-16, 1987	Petitioner was tried for and convicted of Murder in the First Degree for the murder of Lloyd Thompson. Evidence about the Sarfaty homicide ws introduced into the penalty phase. The death penalty was assessed.
January 29, 1987	Petitioner was charged with the October 12, 1985 murder of Roger Sarfaty.
May 20-27, 1987	Petitioner was tried for the murder of Roger Sarfaty.
May 22, 1987	Petitioner was found guilty of Murder in the First Degree.
May 26, 1987	Over defense counsel's objection, the trial court admitted into evidence the Judgment and Sentence reflecting that Petitioner had been convicted of First Degree Murder and sentenced to death for the murder of Thompson.
May 27, 1987	The jury assessed the death penalty for the murder of Sarfaty.
February 28, 1992	On direct appeal to the Oklahoma Court of Criminal Appeals, the conviction for the Thompson murder was reversed.

April 10, 1992	Petitioner's appellate counsel tendered a supplemental brief in the appeal of the Sarfaty case, raising additional issues regarding the unreliability of the death sentence in this case resulting from the reversal of the Thompson case. The Oklahoma Court of Criminal Appeals never ruled on the Motion to file the supplemental brief.
January 13, 1993	The Oklahoma Court of Criminal Appeals affirmed the Judgment and Sentence for the Sarfaty homicide.

DISTRICT COURT OF OKLAHOMA COUNTY

No. CRF-86-3920

THE STATE OF OKLAHOMA

vs.

JOHN JOSEPH ROMANO

First Stage Instructions

NO. 4

You should consider only the evidence introduced while the court is in session. You are permitted to draw such reasonable inferences from the testimony as you feel are justified when considered with the aid of the knowledge which you each possess in common with other persons. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which you find to have been established by the testimony and evidence in the case.

"Direct Evidence" is the testimony of a person who asserts actual, personal knowledge of a fact, such as the testimony of any eyewitness. "Direct Evidence" may also be an exhibit such as a photograph which demonstrates the existence of a fact.

"Circumstantial Evidence" is the proof of facts or circumstances which gives rise to a reasonable inference of other connected facts that tend to show the guilt or the

innocence of a defendant. It is proof of a chain of facts and circumstances that indicates either guilt or innocence.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict.

DISTRICT COURT OF OKLAHOMA COUNTY

No. CRF-86-3920

THE STATE OF OKLAHOMA

vs.

JOHN JOSEPH ROMANO

STATE'S EXHIBIT 15

STAGE II

"EXHIBIT A"

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	CASE NO. CRF-86-3920
JOHN JOSEPH ROMANO, Defendant.	)	

JUDGMENT AND SENTENCE

Now on this 30th day of January, 1987, the same being one of the regular judicial days of the District Court of Oklahoma County, State of Oklahoma, this cause came on for Judgment and Sentence, and the defendant, JOHN JOSEPH ROMANO, being present in person and by his counsel, Ron Evans and Opio Toure, in open Court, and The State of Oklahoma being represented by Robert H. Macy, District Attorney and Lou Keel, Assistant District Attorney, Oklahoma County, State of Oklahoma, and the said defendant, JOHN JOSEPH ROMANO, having been duly presented and arraigned and having pleaded "Not Guilty" to the offense of MURDER IN THE FIRST DEGREE, as charged in the Information filed herein, and having been duly and regularly tried and convicted of said offense in Oklahoma County, State of Oklahoma.

THEREUPON, defendant having been asked by the Court whether he had legal cause to show why Judgment and Sentence should not be pronounced against him, in

conformity with the verdict of the jury, and the defendant giving no good reason why said Judgment and Sentence should not be pronounced, and none appearing to the Court; the Court does hereby adjudge and sentence the said defendant, JOHN JOSEPH ROMANO, for the offense by him committed, in conformity with the verdict of the jury.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the said defendant, JOHN JOSEPH ROMANO, be conveyed from the Bar of this Court to the County Jail of Oklahoma County, State of Oklahoma, and within ten (10) days thereafter be by the Sheriff of Oklahoma County, State of Oklahoma, transported to the Lexington Assessment and Reception Center at Lexington, Oklahoma, where the Warden of the said Center, or his successor in office, is hereby directed to confine the said JOHN JOSEPH ROMANO until he is transferred to any other place of incarceration as designated by the Department of Corrections, State of Oklahoma and on the 20th day of April, 1987, the Warden of the place of incarceration designated by the Department of Corrections is commanded on that day to put the said JOHN JOSEPH ROMANO to death by continuous intravenous administration of a lethal quantity of an ultra-shortacting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice, or in any other manner that may be designated by the laws of the State of Oklahoma, in all respects as provided by law for such execution; and the Clerk of this Court is commanded to deliver to said

Sheriff of Oklahoma County, State of Oklahoma, a certified copy of this Judgment and Sentence, together with the Death Warrant which will be sufficient warrant and authority to the said Sheriff of Oklahoma County, State of Oklahoma and Warden of the said Center, or his successor in office, and Department of Corrections, or any place of confinement of the Department of Corrections, State of Oklahoma, for the execution of the Judgment and Sentence as herein provided; return of this proceedings hereunder to be endorsed thereon and filed as provided by law.

THEREUPON, the defendant, JOHN JOSEPH ROMANO, by his counsel, in open Court, gave notice of his intention to appeal from the Judgment and Sentence herein pronounced, and for good cause shown.

IT IS THEREFORE, the Judgment and Order of the Court that the defendant, JOHN JOSEPH ROMANO, be allowed and he is hereby granted the time allowed by law in which to make, prepare and serve the transcript herein, to all of which proceedings the defendant, JOHN JOSEPH ROMANO, excepted and exceptions duly allowed.

/s/ Jack R. Parr
DISTRICT JUDGE

DISTRICT COURT OF OKLAHOMA COUNTY

No. CRF-86-3920

THE STATE OF OKLAHOMA

vs.

JOHN JOSEPH ROMANO

Second Stage Instructions

NO. 5

In the sentencing stage of this trial, the State has filed a document called a Bill of Particulars. In this Bill of Particulars, the State alleges the Defendant, JOHN JOSEPH ROMANO, should be punished by death, because of the following aggravating circumstance(s):

1. The Defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The murder was especially heinous, atrocious, or cruel;

3. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

4. The existence of a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

NO. 7

The Defendants have entered a plea of not guilty to the allegations of this Bill of Particulars, which casts on the State the burden of proving the material allegations in this Bill of Particulars beyond a reasonable doubt.

The Bill of Particulars simply states the grounds upon which the State seeks imposition of the death penalty. It sets forth in a formal way the aggravating circumstances of which the Defendant is accused. It is, in itself, not evidence that any aggravating circumstances exists, and you must not allow yourselves to be influenced against these Defendants by reason of the filing of this Bill of Particulars.

The Defendants are presumed to be innocent of the charges made against them in the Bill of Particulars, and innocent of each and every material element of said charge, and this presumption of innocence continues unless their guilt is established beyond a reasonable doubt. If, upon consideration of all the evidence, facts, and circumstances in the case, you entertain a reasonable doubt of the guilt of the Defendants of the charges made against them in the Bill of Particulars, you must give them the benefit of that doubt and return a sentence of life imprisonment.

NO. 8

Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those circumstances set forth in these instructions.

Should you unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.

If you do not unaniously [sic] find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life.

NO. 10

Mitigating circumstances are those circumstances which in fairness and mercy, should be considered by you in determining ones fate. What are and what are not mitigating circumstances is for you, the jury, to decide. Evidence has been offered by Defendant, JOHN JOSEPH ROMANO, as to the following mitigating circumstances:

1. The defendant's conduct during the course of this trial.

2. The Defendant has a family that loves and cares about him and are concerned with his welfare.

3. The love he exhibits toward his father, mother and stepmother.

4. The fact the Defendant has friends and family concerned for his future.

5. The fact that throughout his life, the Defendant usually had a job and was well-liked by other employees.

6. That Defendant has, while in jail, been an inspiration to other inmates.

7. That the Defendant has been made a trustee while in jail.

8. That the Defendant has spent considerable time counseling with the Chaplain and done much Bible study while in jail.

9. That the jailers have brought JOHN ROMANO other inmates for him to counsel when they were distraught.

10. That the Defendant has a drug and alcohol problem.

11. That the Defendant has been a follower and not a leader.

12. That the Defendant served in the military and was honorably discharged.

13. That the Defendant aided John Lowery when he was suicidal.

14. Much of the Defendant's criminal activity has involved drugs.

15. That the Defendant would be able to provide counseling services for inmates in prison in the future.

16. That the Defendant graduated from high school.

17. That the Defendant has been a model prisoner.

Whether these circumstances existed, and whether these circumstances are mitigating, must be decided by you.

NO. 12

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

NO. 13

You are instructed that, in arriving at your determination of punishment, you must first determine whether at the time this crime was committed any one or more of the following aggravating circumstances alleged against Defendant John Joseph Romano, existed beyond a reasonable doubt:

1. The Defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The murder was especially heinous, atrocious, or cruel;

3. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

4. The existence of a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

NO. 19

In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the State and the Defendant during the sentencing phase of this proceeding.

All the previous instructions given you in the first part of this trial apply where appropriate and must be considered together with these additional instructions. Together they contain all the law of any kind and the rules you must follow in deciding this case. You must consider them all together and not just a part of them.

You are the determiner of the facts. The importance and worth of the evidence is for you to decide.

I have made rulings during the second part of this trial. In ruling, I have not in any way suggested to you, nor intimidated [sic] in any way, what you should decide. I do not express any opinion whether or not aggravating circumstances or mitigating circumstances did or did not exist, nor do I suggest to you in any way the punishment to be imposed by you.

You must not use any kind of chance in reaching a verdict, but you must rest it on the belief of each of you who agrees with it.

You have already elected a foreman. In the event you assess the death penalty, your verdict must be unanimous. You may also return a unanimous verdict of life imprisonment. Proper forms of verdict will be given you which you shall use in expressing your decision. When

you have reached a verdict, all or you in a body must return it into open court.

The law provides that you shall now listen to and consider the further arguments of the attorneys.

COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. F-87-441

JOHN JOSEPH ROMANO

vs.

THE STATE OF OKLAHOMA

Opinion dated January 13, 1993
Affirming Romano's Conviction on Direct Appeal

Rehearing Denied March 17, 1993

OPINION

LUMPKIN, Vice-Presiding Judge:

Appellant John Joseph Romano was tried by jury and convicted of Murder in the First Degree (21 O.S.1981, § 701.7) and Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies (21 O.S.1981, § 801), Case No. CRF-87-397, in the District Court of Oklahoma County. The jury found the existence of four aggravating circumstances and recommended punishment of death for the murder conviction and one thousand (1000) years imprisonment for the robbery conviction. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal.

Appellant and co-defendant David Woodruff were found guilty of the first degree murder of Roger Sarfaty. The decedent's body was discovered on October 16, 1985, in his apartment in Oklahoma City. The decedent had been beaten, strangled and stabbed. Further facts will be presented as necessary.

I. JURY SELECTION ISSUES

Appellant contends that it was reversible error for the trial court to refuse to conduct a hearing as to whether jury foreman McDonald had knowledge of Appellant's involvement in the Lloyd Thompson murder[1] and whether this knowledge had been communicated to the jury. The record reveals that Mr. Eugene McDonald was one of the original twelve venirepersons called to service. The State's list of witnesses was belatedly read to the jury, preceding the eighth peremptory challenge to the panel. One of the venirepersons stated that he recognized the name "Cheryl Moody" as that of a secretary at his place of employment. Although the prospective juror is not identified by name in the transcript, the Appellant states that it was Mr. McDonald. This is not disputed by the State. The following exchange then took place:

> MR. KEEL: (Prosecutor) In the event she is called to testify in this case, is there anything about the relationship you have had from what you have known of Cheryl Moody, to this point, that you think would make it hard for you to be fair and listen to the testimony. In other words, because of you having known her, would you give her more or less weight her testimony than you would anybody else?
>
> PROSPECTIVE JUROR: No, sir.
>
> MR. KEEL: So you can be fair to both sides in this case in spite of that?

[1] In January, 1987, Appellant and co-defendant Woodruff were convicted of the first degree murder of Lloyd Thompson and sentenced to death.

> PROSPECTIVE JUROR: I believe so.

(Vol. II, Tr. 193-194)

The defense did not question him further, did not challenge him for cause nor remove him with a peremptory challenge. At that time, Appellant and co-defendant Woodruff each had one (1) peremptory challenge remaining. Both challenges were waived. Mr. McDonald remained on the jury and was ultimately selected as foreman.

On the seventh day of trial, before closing arguments were to be given in the second stage, counsel for Appellant and co-defendant Woodruff asked that the jurors be individually questioned to determine whether during first stage deliberations they had learned of the defendants' connection with the Thompson murder. It was revealed that Cheryl Moody was the daughter of Lloyd Thompson.

The reason given by defense counsel for the motion was their opinion that the jury did not react appropriately to the State's reading of the bill of particulars and the mention of the convictions for the Thompson murder and the length of time during first stage deliberations.[2]

[2] The record reflects that the jury began its first stage deliberations on May 22, 1987. Sometime before 6:30 p.m., the jury reported to the trial judge that it was split 6 to 6. The jury was then sent to dinner before resuming its deliberations. A verdict of guilty was returned that same day. Comments by defense counsel indicate that the jury returned approximately five (5) hours after announcing their deadlock with a guilty verdict, while comments by the trial court indicate it was one hour.

The trial court denied the motion, stating that to grant it would violate the sanctity of the jury.

Appellant now argues in the alternative that failure to hold a hearing to determine whether Mr. McDonald communicated his knowledge to the other jurors was error, the failure to excuse McDonald from the jury was error, and that trial counsel was ineffective for failing to remove him from the jury. We disagree with Appellant's arguments and find no reason for reversal or modification. The record reflects that Mr. McDonald was competent to serve as a juror and that Appellant has failed to show that he was denied a fair trial by Mr. McDonald's service on the jury. The question of the competency of jurors is addressed to the sound discretion of the trial court, and absent an abuse thereof, the finding of the trial court will not be upset on review. *Greathouse v. State*, 503 P.2d 239, 240 (Okl.Cr.1972).

During voir dire, Mr. McDonald clearly indicated that he understood that the defendants were presumed to be innocent of the charges against them; that the State had the burden of proof and if the State did not meet that burden of proving guilt beyond a reasonable doubt, that the defendants' must be found not guilty. He further indicated that he could keep an open mind and listen to all the evidence presented by both the State and the defense and that he knew of no reason why he could not be a fair juror. He assured defense counsel that he would hold the State to its burden of proof and make them prove each and every element, beyond a reasonable doubt, of the crimes charged against the defendants. Mr. McDonald indicated that he could follow the court's

instructions as to the law, and that he was not prejudiced against the defendants. (Vol. I, Tr. 83, 154-155, 174)

By failing to exercise his last peremptory challenge, Appellant has waived whatever claim he may have had concerning the partiality or improper makeup of the jury. *See Greathouse*, 503 P.2d at 241 (wherein the trial judge refused to grant a mistrial after a juror indicated that he knew one of the State's witnesses. The conviction was affirmed based on the juror's indication that knowledge of the witness would not affect his partiality. We held that when defense counsel failed to inquire as to the knowledge of the witness by the juror, any error was waived.) *See also Hamilton v. State*, 79 Okl.Cr. 124, 152 P.2d 291, 295 (1944).

However, due to the nature of Appellant's allegations, we will address the issue further. The jury trial system is founded on the impartiality of a body of peers selected by counsel. Voir dire is the procedure designed to give a criminal defendant the opportunity to explore the opinions and personal knowledge of potential jurors who may ultimately decide his fate. One of the purposes of voir dire is to ensure a criminal defendant's right to a fair and impartial jury. The critical fact to be determined is whether the defendant received a fair trial from jurors who could lay aside any personal opinions and base a verdict on the evidence.

In the present case, the trial court conducted an exhaustive voir dire. Those prospective jurors with preconceived opinions for or against Appellant, who could not set aside those opinions or who had doubts about their ability to be impartial, were excused. The remaining

prospective jurors were questioned further as to their knowledge of persons involved in the case. Counsel for the State and for both defendants carefully questioned each prospective juror to make certain that each could and would set aside any emotion he or she might have concerning this case and depend solely on the evidence presented during trial to decide the outcome. As a result, we find that the defendants were left with twelve impartial jurors.

The mere fact that Mr. McDonald knew Lloyd Thompson's daughter does not render him incapable of serving on the jury. A criminal defendant is not entitled to jurors who know nothing about his case. *Hale v. State*, 750 P.2d 130, 134 (Okl.Cr.1988), *cert. denied*, 488 U.S. 878, 109 S.Ct. 195, 102 L.Ed.2d 164 (1988); *Brecheen v. State*, 732 P.2d 889, 892 (Okl.Cr.1987), *cert. denied*, 485 U.S. 909, 108 S.Ct. 1085, 99 L.Ed.2d 244 (1988); *Wooldridge v. State*, 659 P.2d 943, 946 (Okla.Cr.1983). The constitutional guarantee of a fair and impartial trial does not exclude service by a juror with knowledge of facts and circumstances involving the case, but only those persons who use that knowledge to form opinions concerning the merits of the case, or who form a negative opinion of the defendant based on that knowledge *Smithey v. State*, 385 P.2d 920, 924 (Okl.Cr.1963).

Judge Saied's refusal to hold an evidentiary hearing to determine whether or not any improper information had been imparted to the other jurors was a proper determination. In order to establish juror misconduct, "a defendant must show actual prejudice from any alleged jury misconduct and defense counsel's mere speculation and surmise is insufficient upon which to cause reversal".

Chatham v. State, 712 P.2d 69, 71 (Okl.Cr.1986). *See also Parsons v. State*, 603 P.2d 1144, 1146 (Okl.Cr.1979).

The record in the present case is absolutely barren of anything other than speculation or surmise by defense counsel. Judge Saied, an experienced trial judge, disputed defense counsel's observations on the record. He stated that he observed the jury during the reading of the bill of particulars. At the mention of the prior murder conviction, he noticed two jurors in particular who showed some surprise. He added that he did not think that Mr. McDonald knew of the murder conviction, but if he did, there was nothing to indicate that he had said anything about it to the other members of the jury. Regarding the length of the first stage jury deliberations, he did not find it unusual to have a jury deadlocked 6 to 6 and return a few hours later with a guilty verdict. He further commented:

> [i]f I did this I think I would be violating sanctity of the jury itself. They have deliberated and we have no right to go in and ask how they did it and why they did it. I have given them an admonition every time, a very strong one I think you all know. In fact I add to it more than was actually required by statute, and it has been a very strong admonition in my opinion. I can't invade the province of the jury and ask them his question. . . . (Vol. VII, Tr. 5)

Whether or not to hold an evidentiary hearing was within the discretion of the trial court. Finding no abuse of that discretion, we find no error.

Similarly, we do not find defense counsel's decision to leave Mr. McDonald on the jury indicative of ineffective assistance of counsel; in spite of a comment by the trial judge that he thought Mr. McDonald would be removed by the defense. Counsel admitted that the decision not to remove Mr. McDonald was a part of their trial strategy. In hindsight, it may appear to the Appellant that the strategy may not have been appropriate, but this is not sufficient to meet the test of ineffectiveness established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We have previously refused to evaluate the performance of trial counsel on hindsight. *Dunham v. State*, 762 P.2d 969, 975 (Okla.Cr.1988); *Smith v. State*, 650 P.2d 904, 908 (Okl.Cr.1982). Further, through the review of cases on appeal, this court is familiar with trial counsel for both defendants and find them to be experienced, capable capital litigators whose strategic choice to leave Mr. McDonald on the jury was well within the range of professionally reasonable judgment.

We find that Appellant was not prejudiced by counsel's decision as he has failed to show that there is a reasonable probability that the outcome of the case would have been different. Based upon the foregoing, we find that Appellant is not entitled relief due to the service of Mr. McDonald on the jury. Accordingly, this assignment of error is denied.

Prior to trial Appellant filed a Motion to Quash the jury panel asserting then as he does now on appeal that he was denied a jury representative of a fair cross-section of the community because 38 O.S. 1981, § 28(A), allows jurors seventy years of age or above to opt out of jury service. In *Moore v. State*, 736 P.2d 161, 165 (Okl.Cr.1987),

cert. denied, 484 U.S. 873, 108 S.Ct. 212, 98 L.Ed.2d 163 (1987), we stated that *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), held that a defendant must establish a prima facie case in order to show a violation of the requirement that criminal defendants are entitled to juries drawn from a fair-cross section of the community. Appellant has failed to make such a prima facie showing in the instant case, as he has not shown that this exemption from jury service excludes a sufficiently numerous and distinct group, that representation of this group in venires is not fair and reasonable in relation to the number of such people in the community, and that this underrepresentation is due to the systematic exclusion of the group in the jury selection process. *Sellers v. State*, 809 P.2d 676, 682 (Okl.Cr. 1991); *Fox v. State*, 779 P.2d 562, 566 (Okl.Cr.1989). Accordingly, this assignment of error is denied.

Appellant also alleges that the trial court erred in not allowing individual voir dire of each juror, out of the hearing of the others, as to their views on capital punishment. In *Foster v. State*, 714 P.2d 1031, 1037 (Okl.Cr.1986), *cert. denied*, 479 U.S. 873, 107 S.Ct. 249, 93 L.Ed.2d 173 (1986), we stated:

> [a]though such a practice may be allowed by a trial judge, it is an extraordinary measure . . . Unless the danger of prejudicing the jurors by exposure to damaging information is a grave problem or some special purpose would be served, it is unlikely that individual voir dire would be justified. We find no abuse of discretion in not allowing the procedure.

Nor do we find any abuse of discretion in this case. The record reflects that both the State and the defense conducted an extensive voir dire examination. It does not appear that Appellant was prejudiced by not questioning the venire individually. *Sellers*, 809 P.2d at 682; *Fox*, 779 P.2d at 568; *Vowell v. State*, 728 P.2d 854, 857 (Okl.Cr.1986). Accordingly, this assignment of error is denied.

Appellant also alleges that the prosecutor's use of peremptory challenges to remove all potential jurors with any reservations about the death penalty produced a jury "uncommonly willing to condemn a man to die" in violation of the rule *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). He also urges extension of the rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), that the State cannot use a peremptory challenge to remove a prospective juror solely because of race, to require that this Court prohibit the State from exercising a peremptory challenge to excuse a juror from whom the court received equivocal responses on voir dire.

In *Witherspoon* the Supreme Court held that the exclusion of those potential jurors who express "conscientious scruples" against the death penalty violates a defendant's right to a fair and impartial jury. A standard was established that a venireperson could be excused from jury service on a capital case only if he or she made "unmistakably clear" his or her automatic refusal to impose a death sentence or an inability to impartially judge a defendant's guilt. In *Walker v. State*, 723 P.2d 273, 281 (Okl.Cr.1986), this Court recognized that the Supreme Court had superseded the *Witherspoon* standard into a single test of "whether the juror's view would prevent or

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This single test not only eliminated the requirement that a juror would vote automatically against the death penalty before he or she may be excused, but also removed the requirement that such a view must be proved with "unmistakable clarity." *Id.*, 469 U.S. at 424, 105 S.Ct. at 852.

Applying this rule to the instant case, we find that the two prospective jurors[3] in question were not improperly removed from the panel. Both stated that they believed in the death penalty but wavered throughout voir dire on their ability to actually impose such a sentence. We find that their responses established the fact that their views about capital punishment would have prevented or substantially impaired their duties as jurors in accordance with the instructions and their oath. *See Battenfield v. State*, 816 P.2d 555, 558 (Okl.Cr.1991); *Banks v. State*, 701 P.2d 418, 423 (Okl.Cr.1985) *cert. denied*, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 611 (1988).

In *Batson* the Supreme Court determined that the Equal Protection Clause prohibits "exclusion of potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89, 106 S.Ct. at 1719. This rule does not alter existing principles which entitle a prosecutor "to exercise permitted peremptory challenges for any

---

[3] Venirepersons Stark and Paine.

reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried." *Id.* No authority supports the proposition that equivocal jurors create a suspect class which invokes the stringent requirements of the Equal Protection Clause, and which would permit extension of the limited *Batson* rule. To the contrary, peremptory challenges need not be supported by any specific reasoning, unless the defendant asserts purposeful discrimination under *Batson*. 22 O.S.1981, § 654. We have previously held that both the State and the defense may excuse prospective jurors who respond equivocally to questions about the death penalty. *White v. State*, 674 P.2d 31 (Okl.Cr.1983). We are not persuaded to change our view.

No violation of equal protection principles arose in the present case. We have found no evidence in the record to suggest that jury selection involved purposeful discrimination or yielded a jury with an uncommon willingness to impose the death penalty. Accordingly, this assignment of error is denied.

II. GUILT-INNOCENCE ISSUES

In his second assignment of error, Appellant contends that the evidence presented at trial was insufficient to support the verdicts of guilt. He argues that the circumstantial nature of the evidence of both the murder and the robbery, at best, raised only suspicion and speculation of guilt.

Circumstantial evidence and the reasonable inferences drawn therefrom have the same probative effect as

direct testimony. When the evidence against the defendant is wholly circumstantial, as in this case, considering the evidence and inferences therefrom in the light most favorable to the State, it must be inconsistent with any reasonable hypothesis other than the defendant's guilt. *Greer v. State*, 763 P.2d 106, 107 (Okl.Cr.1988); *Smith v. State*, 695 P.2d 1360, 1362 (Okl.Cr.1985). The State is not required to exclude every conceivable hypothesis or negate any possibility other than guilt. *D.R.R. v. State*, 734 P.2d 310, 311 (Okl.Cr.1987).

When an appellant contends that he was convicted upon insufficient evidence, this Court must consider and examine the entire record. *Lee v. State*, 661 P.2d 1345, 1354 (Okl.Cr.1983). While each co-defendant is entitled to have his case decided on the basis of the evidence against him, this does not require this Court to review the evidence in a vacuum. Where two or more defendants are charged with acting in concert, evidence against each is available against the others. *Cooper v. State*, 584 P.2d 234, 237 (Okl.Cr.1978).

The evidence presented by the State in the instant case showed that the decedent was a jewelry dealer who lived alone in an apartment at the May Ridge Apartment complex in Oklahoma City. The decedent kept large amounts of jewelry, both new and older tarnished pieces, in his apartment. The decedent was also known to wear jewelry, particularly rings on every finger. In his apartment the decedent kept large cardboard buckets of change, specifically quarters. He was a regular customer at the Celebrity Club, coming in every night at approximately 12:30 and remaining until the 2:00 a.m. closing.

The decedent was last seen leaving the club on Saturday, October 12 at 2:00 a.m.

On October 16, 1985, the decedent was found murdered. He had been beaten, strangled and stabbed five (5) times. Testimony from medical witnesses indicated that he had been dead for approximately two to three days. A newspaper, dated October 12, 1985, was found opened in his apartment. Rolled, unopened newspapers, dated October 13, 14, and 15, 1985, were found outside the apartment. No buckets of change were found in the apartment nor was any jewelry found on the decedent. A pair of slacks with the pockets pulled out was found draped over a door.

Appellant was incarcerated at the Enid Community Treatment Center during September and October 1985. He regularly received leave passes from the Center, including a weekend pass for October 11 through 13, 1985, when he checked out to Oklahoma City. While in Oklahoma City Appellant would stay at the residence of his girlfriend Marilyn Tyson. After one of Appellant's visits in late September or early October, Ms. Tyson discovered that some of her jewelry was missing. She questioned Appellant about the jewelry but he denied any knowledge. He stated that he would try to find out what happened to the missing pieces. When Ms. Tyson subsequently informed Appellant that she would turn the information over to her insurance company and would make known to the police her suspicions of him, Appellant became upset and asked for more time to find out what happened to the jewelry. At a later date, Appellant told Ms Tyson that he found out that the missing jewelry

had been pawned to a jeweler and that the jeweler had been killed.

During the early part of October 1985, Appellant phoned Tracy Greggs and asked him to take him to meet the decedent to talk over some business. Greggs picked Appellant up at Ms. Tyson's home and drove him to the decedent's apartment. Appellant told Greggs that he had some rings which belonged to Ms. Tyson that he wanted to sell to Sarfaty. Appellant stated that he needed some money and had planned to rob Sarfaty and steal some of his jewelry, but as Sarfaty knew him he would also have to kill him. Appellant attempted to elicit Greggs' aid, but Greggs refused to participate. The decedent was found murdered a few days after this conversation.

On Saturday afternoon, October 12, 1985, Appellant and co-defendant Woodruff were together in a store in Quail Springs Mall. The two men were carrying cups of beer and appeared to be intoxicated. When they spilled the beer and vomited in the store, security was called to remove them. Woodruff initially refused to leave, announcing that he wanted to purchase a television. He told the clerk that they did not need any credit, that they had money. He and Appellant then emptied their pockets of quarters. The store clerk also testified that she saw what appeared to be a blood stain on Woodruff's pant leg. She said that he showed her a small cut on his hand.

Eventually, the men cooperated with the security personnel and were removed from the store. The quarters, estimated to be between $15.00 and $30.00 worth, but not counted, were scooped up in Appellant's baseball cap. Appellant and Woodruff were retained in a holding cell

until they could be turned over to the Oklahoma City Police Department. A lock blade knife was removed from one of them.

Under a charge of disorderly conduct and public intoxication, the men were transferred to the Detox Center. All of their personal belongings were sent with them. Procedures for booking a person into the Detox Center were more relaxed than those used in the county jail. Although not directly removed from him, a knife and two pens were listed as property checked by Romano. Both men refused to check any money or jewelry.

Denise Howe, Woodruff's girlfriend, subsequently picked up Appellant and Woodruff at the Center. Under their direction, she drove them back to Quail Springs Mall to retrieve Woodruff's car. She observed numerous small "diamond" papers (papers used to wrap diamonds and other small stones) surrounding the car. Ms. Howe testified that the following day she saw Woodruff with some gold jewelry she had not seen previously. She described the jewelry, a necklace and five or six rings, as looking old and tarnished. She said that Woodruff did not have the money to purchase the jewelry. Woodruff subsequently mailed the jewelry to a friend in California.

On October 16, 1985, at the residence shared with Ms. Howe, Woodruff received a phone call from the Enid Community Treatment Center. He and Ms. Howe subsequently drove out to the May Ridge Apartments. The sight of numerous police cars made Appellant nervous and fidgety and the two turned around and drove home.

Denise Howe further testified to receiving a phone call from Woodruff, after he had been taken into custody,

to "clear out the house". In response to such request she removed pieces of rope, a watch and a pair of gloves. These items were later turned over to the police. A portion of the rope was tied in a fashion known as a garotte. The medical examiner testified that the width of the rope was consistent with the ligature marks found on the decedent.

This Court has held repeatedly that the jury is the exclusive judge of the weight of the evidence and the credibility of the witnesses testimony. *Hollan v. State*, 676 P.2d 861, 864 (Okl.Cr.1984); *Isom v. State*, 646 P.2d 1288, 1292 (Okl.Cr.1982). Although there may be conflict in the testimony, if there is competent evidence to support the jury's finding, this Court will not disturb the verdict on appeal. *Enoch v. State*, 495 P.2d 411, 412 (Okl.Cr.1972). A reviewing court must accept all reasons, inferences and credibility choices that tend to support the verdict. *See Washington v. State*, 729 P.2d 509, 510 (Okl.Cr.1986).

Here the jury found sufficient evidence of guilt although Appellant thoroughly cross-examined the State's witnesses, successfully drawing attention to certain inconsistencies; placed before the jury names of several other persons who could have been responsible for the decedent's murder; and presented a witness who stated that he saw the decedent Sunday morning, the day after the State theorized the decedent was killed. In our review of the evidence, we find that sufficient evidence of guilt was presented to support the jury's findings and that such evidence satisfies the "reasonable hypothesis" test, demonstrating more than a suspicion of guilt. Therefore, we refuse to interfere with the jury's verdicts of guilt and this assignment of error is denied.

In his third assignment of error Appellant contends that he was denied a fair trial by prosecutorial misconduct. Appellant has specified approximately fourteen (14) instances during first stage closing argument arguing that the prosecutor deliberately misrepresented the evidence, vouched for the credibility of prosecution witnesses, denigrated defense witnesses, elicited sympathy for the victim and aligned himself with the jury. Ten (10) of these remarks were met with objections by the defense. Two (2) of these objections were sustained while the rest were overruled. In three (3) instances the jury was admonished to rely on its own memory of the evidence. We have carefully reviewed each of the allegations and find that the complained of remarks did not affect the outcome of this trial and that they neither separately nor cumulatively warrant modification or reversal.

It is well established that prosecutors are entitled to fully discuss the evidence from their standpoint, drawing all logical inferences and deductions arising from that evidence. *Holt v. State*, 628 P.2d 1170, 1171 (Okl.Cr.1981); *Glidewell v. State*, 626 P.2d 1351, 1353 (Okl.Cr.1981). We recognize, as did the United States Supreme Court in *United States v. Young*, 470 U.S. 1, 10, 105 S.Ct. 1038, 1043, 84 L.Ed.2d 1, 9 (1985), that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be prejudicial to the accused." However, " . . . a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Id.*, 470 U.S. at 11, 105

S.Ct. at 1044, 84 L.Ed.2d at 11. This Court has held that in order for the remarks of the prosecuting attorney to constitute reversible error they must be flagrant and of such a nature as to be prejudicial to the defendant. *Collins v. State*, 758 P.2d 340, 341 (Okl.Cr.1988); *Wimberli v. State*, 536 P.2d 945, 952 (Okl.Cr.1975). From a practical standpoint, every slight excess by the prosecutor does not require that a verdict be overturned and that a new trial be ordered. *Aiuppa v. United States*, 393 F.2d 597 (10th Cir.1968).

While some of the remarks, taken singly, exceeded the bounds of fair argument, the prosecutor's comments, when read in context, did not deprive Appellant of a fair trial. The record reveals no showing of a bad faith attempt to prejudice the jury nor an intentional emphasis upon collateral matters. Many of the complained of remarks came during the second portion of the closing argument, in reply to Appellant's closing argument. As we are not persuaded that the challenged remarks seriously affected the fairness of the trial, this assignment of error is denied.

In his fourth assignment of error Appellant asserts that the trial court infringed upon his constitutional rights to confront the witnesses against him and to present witnesses in his defense by preventing him from eliciting relevant evidence indicating the involvement of others in the crimes charged.

During the course of the trial it became evident that the theory of defense was that of innocence and that someone other than the Appellant was responsible for the murder. Appellant's attempts to introduce evidence of the

involvement of T.R. Ballard, Kathy Ford and Susan Babbit were frequently met with objections by the State; objections which the trial court sustained. Questions concerning the relevancy of particular evidence are within the discretion of the trial court. *Fitchen v. State*, 738 P.2d 177, 180 (Okl.Cr.1987). A determination that the evidence should be excluded as irrelevant should be affirmed unless there is a clear showing of abuse accompanied by prejudice. *Klinekole v. State*, 705 P.2d 179, 184 (Okl.Cr.1985).

In *Quinn v. State*, 55 Okl.Cr. 116, 25 P.2d 711 (1933), this Court held that evidence offered to show that some other person committed the crime charged must connect such other person with the fact; that is some overt act on the part of another towards the commission of the crime itself. There must be evidence of acts of circumstances that tend clearly to point to another, rather than the accused. *See also Case v. State*, 555 P.2d 619, 623 (Okl.Cr.1976). We addressed this issue again in *Tahdooahnippah v. State*, 610 P.2d 808, 810 (Okl.Cr.1980), and stated that it was not enough to show a possible motive on the part of another; the evidence must show an overt act by the third person toward the commission of a crime.

Appellant attempted to interject evidence that the decedent was involved with prostitutes, one of which was Susan Babbitt. Babbitt's name was brought up during the cross-examination of Detective Sealy. He testified that a Susan Babbit was located but the police were unable to connect her with the Appellant, other than as an acquaintance from the Celebrity Club. Sealy stated that his investigation revealed that she was not the decedent's

girlfriend and that no connection could be drawn between Ms. Babbitt and Kathy Ford.

Much of the evidence Appellant wanted to introduce about Kathy Ford came in either over the State's objection or with no objection from the State. Detective Sealy testified on cross-examination that the name Kathy Ford had come up in the investigation into the murder; however, they were not able to verify any actual person known to be Kathy Ford. An offer of proof was made by Appellant that, if permitted, Detective Sealy would testify that the name Kathy Ford came up several times as having possibly set the decedent up and robbed him.

During his case in chief, Appellant established that the decedent had last been seen by a neighbor arguing with a blonde headed woman. Evidence was also introduced to show that a knife had been sold to a person who gave her name as Kathy Ford. As with Susan Babbitt, none of the evidence presented or included in the offers of proof connected Ford with the commission of the murder. Appellant was also able to place before the jury substantial evidence of T.R. Ballard. However, evidence that Ballard knew the decedent from frequenting the same pool hall, that Ballard was destitute before the decedent's death, but seen with cash and jewelry after the murder, shows no overt act by him in the commission of the murder.

An offer of proof was made that Ballard's name was mentioned frequently in police reports. Defense counsel stated that, if permitted, Tom Farris would testify that Ballard and the decedent had business dealings and that the decedent had some problems with Ballard. When the

court inquired into what the problems were and whether threats had been made defense counsel did not specifically respond to the court's inquiry but stated that the evidence was offered to show motive and opportunity. It was also stated that a witness testified as to Ballard's having slapped the decedent at some point in time. The court sustained the State's objection and informed the defense that the evidence could come in during the testimony of the witness who made the statement. No such testimony was ever offered. Without that testimony or further evidence showing some act by Ballard in furtherance of the murder, we find the trial court properly ruled that further evidence was not relevant.

Appellant contends in his fifth assignment of error that the trial court erred in admitting prejudicial hearsay testimony from prosecution witness Jerry Jones. Mr. Jones testified to a conversation he had with several men, including Appellant, at a pool hall in Oklahoma City on October 12, 1985. Appellant specifically objects to Jones' testimony that it was common knowledge around the pool hall which he and Appellant frequented that the decedent was murdered on a Saturday and that the body had been discovered on a Monday or Tuesday. Appellant's objection was overruled and Jones was permitted to testify further that the above information was common knowledge because the owner of the pool hall had an acquaintance who was a medical examiner.

Appellant argues that Jones' third hand information was clearly hearsay for which no exception exists and was not admissible for any purpose. We disagree. In *Williams v. State*, 542 P.2d 554 (Okl.Cr.1975), *vacated on*

other grounds, Williams v. Oklahoma, 428 U.S. 907, 96 S.Ct. 3218, 49 L.Ed.2d 1215 (1976) we stated:

> . . . The clearest case of hearsay is where a witness testifies to the declaration of another for the purpose of proving the facts asserted by the declarant. The hearsay rule, however, does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. It does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or falsity, such evidence is admissible as a verbal act. . . . (Footnotes omitted)

542 P.2d at 574.

See also Nunley v. State, 660 P.2d 1052, 1055 (Okl.Cr.1983); *Garcia v. State*, 639 P.2d 88, 89 (Okl.Cr.1981); *Godwin v. State*, 625 P.2d 1262, 1265 (Okl.Cr.1981).

The information to which Jones testified was knowledge which he acquired as a result of a general conversation with Appellant and others at the pool hall about the death of Roger Sarfaty. The testimony was not offered to prove the truth of the matter asserted, that the decedent had in fact been killed on Saturday and that the body was not found until Tuesday. Rather, it was offered to show that those in the pool hall, including Appellant and Jones, had talked about Sarfaty's death; as foundation for Appellant's statement to Jones; and as the basis for Jones' observation of Appellant's demeanor. Therefore, as the

testimony was not hearsay, Appellant's contention is denied.

In his sixth assignment of error Appellant complains that two pieces of rope retrieved from the home shared by Woodruff and Denise Howe were improperly admitted into evidence. He argues that the State failed to show the relevance of the rope by connecting it to the crime. The general rule regarding demonstrative evidence is that it is admissible if it is relevant and the probative value of the evidence outweighs the prejudicial effect. *Sheker v. State*, 644 P.2d 560, 562 (Okl.Cr.1982), 12 O.S.1981, §§ 2402, 2403. Admission of a weapon in a murder case is proper "if significant evidence exists from which a reasonable inference can be drawn that the weapon was used by the defendant to commit the crime." *Pannell v. State*, 640 P.2d 568, 571 (Okl.Cr.1982). On appeal, the burden of establishing prejudice from the admission of incompetent evidence is upon the defendant. *Moser v. State*, 509 P.2d 184, 185 (Okl.Cr.1973).

In this case, the rope was received by the police from Denise Howe. She took the rope out of the closet shared with Woodruff at his request to "clear out the house." One of the pieces of rope was tied in a garrotte. Testimony established that a rope tied in this manner could be used as a strangulation device. The rope was examined by the medical examiner and found to be consistent with the size and weight of rope which left the ligature marks on the decedent's body. The pattern of bruising on the decedent's neck was particularly unique and probative of the manner in which the rope was used. The way in which the rope was tied was compatible with the type of bruising which resulted. This Court has long held that in

order to be relevant, the evidence need not conclusively, even directly, establish the defendant's guilt. Any legal evidence from which the jury may adduce the guilt or innocence of the defendant is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue. *Ashlock v. State*, 669 P.2d 308, 310 (Okl.Cr.1983); *Fahay v. State*, 288 P.2d 757, 760 (Okl.Cr.1955). See also, 12 O.S.1981, § 2401.

The rope was relevant to the case in allowing the jury to visualize one of the weapons used in the attack. We find that the State sufficiently connected the rope to the crime and to the Appellant to permit its proper introduction into evidence. Accordingly, this assignment of error is denied.

Further, Appellant finds error in the opinion testimony of Detective Mullinex that the rope was tied in a garrotte and in the demonstration of how it could be used as a weapon. The testimony was properly admitted under 12 O.S.1981, § 2702 as that of an expert. Under section 2702 expert opinion testimony is admissible if it is based upon specialized knowledge unavailable to the layman and if it will assist the trier of fact in making a decision.

Detective Mullinex was not originally assigned to Appellant's case but was the chief investigator by August 1986, when Denise Howe turned over the rope to the police. He subsequently submitted it to the forensics lab for analysis. His opinion that the rope was tied in a manner known as a garrotte and that a garrotte could be used as a strangulation device was based upon his personal knowledge. As a police officer he was certainly more familiar with the uses of a rope as a weapon than

the general public. See *Farris v. State*, 670 P.2d 995, 997 (Okl.Cr.1983), *Harvell v. State*, 395 P.2d 331 (Okl.Cr.1964).

Further, the rope was a critical piece of evidence. The manner in which it was tied required an explanation. The opinion of Detective Mullinex was highly probative of the determination of whether or not the rope was used as a murder weapon. As such we find that the testimony met the requirements of Section 2702 and there was no error in admitting this testimony. *See Green v. State*, 713 P.2d 1032, 1039 (Okl.Cr.1985), *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986).

Detective Mullinex also demonstrated, over the objection of defense counsel, the use of the garrotte. It was placed around the neck of an Assistant District Attorney with the gap in the back where the two ropes were pulled together pointed out to the jury. Appellant argues it was error for the trial court to permit the demonstration.

The demonstration in the present case does not compare to that in two cases cited by the Appellant *Ford v. State*, 719 P.2d 457 (Okl.Cr.1986), and *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982). In *Ford* we condemned the prosecutor's conduct of demanding that the defendant pick up the gun used in the homicide and show the jury how it was used. While in *Brewer* we found the defendant was prejudiced during the prosecutor's cross-examination of the defendant's expert witness on insanity by stabbing a picture of the decedent with the knife allegedly used to commit the murder. In both cases the prosecutor's conduct was found to be prejudicial theatrics which went entirely outside the record and had no probative value.

The demonstration here is similar to that discussed in two cases cited by the State. In *State v. Sutherland*, 24 Wash.App. 719, 604 P.2d 957 (1979), *rev'd on other grounds*, 94 Wash.2d 527, 617 P.2d 1010 (1980), and *State v. Rich*, 395 A.2d 1123, 1131 (Me.1978), demonstrations of weapons for illustrative purposes were upheld. Although the defendant was not placed in actual possession of the weapon used in either case, the demonstrations were found relevant and helpful to the jury. In *Sutherland* the evidence established that the defendant had purchased a .38 caliber Smith and Wesson revolver, a weapon which could produce the precise physical characteristics found on the bullets removed from the decedent and examined by the ballistics expert. The evidence also showed and absence of any record of the transfer of that weapon until the time of the decedent's death.

In *Rich* the evidence showed that the murder weapon was a pengun. The defendant owned an carried a pengun which he threw into the water off the wharf shortly after the murder took place. The exhibition of a pengun to the jury, similar to the one owned by the defendant and of a type unknown to the general public, was upheld as the unique physical makeup aided in explaining to the jury its construction and use.

In the present case, the rope was removed by the co-defendant's girlfriend, at his request, from a closet shared by the two. The physical characteristics of the rope were consistent with the marks left on the decedent's body. Contrary to Appellant's assertion, the general public is not familiar with the use of a garrotte or the process of strangulation. Because of the specific configuration in

which the rope was tied, the demonstration was highly informative.

Further, we do not find the demonstration "grandstanding" as Appellant suggests, but an illustration of a use of the evidence which was helpful to the jury in deciding the issue before them. The brief demonstration was not so prejudicial as to outweigh the probative value of helping the jury understand how the rope could have been used. Appellant was able to thoroughly cross-examine Detective Mullinex as to his opinion and demonstration. Therefore, we find that the trial court did not abuse its discretion in permitting the demonstration. *See Palmer v. State*, 719 P.2d 1285, 1288 (Okl.Cr.1986). This assignment of error is denied.

IV. ISSUES RELATING TO PUNISHMENT

Title 21 O.S.1981, § 701.11, provides in part that if a jury returns a verdict of death, "it shall designate in writing . . . the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt." Appellant challenges the constitutionality of this section arguing that it mandates a general verdict with special findings of fact; a type of verdict prohibited by Art. 7, § 15 of the Oklahoma Constitution.

It is a well established rule of law that a legislative act is presumed to be constitutional. *Hilliary v. State*, 630 P.2d 791, 794 (Okl.Cr.1981); *White v. Coleman*, 475 P.2d 404, 405 (Okl.Cr.1970). Whenever reasonably possible statutes should be construed so as to uphold their constitutionality. *State v. Madden*, 562 P.2d 1177, 1179

(Okl.Cr.1977). The party attacking the constitutionality of the statute has the burden of proof. *Williamson v. State*, 463 P.2d 1004 (Okl.Cr.1969). When reviewing the constitutionality of a legislative act, we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but rather to see whether the act is prohibited. *Draper v. State*, 621 P.2d 1142, 1146 (Okl.1980).

Title 21 O.S.1981, § 701.11 addresses the procedures to be followed during the sentencing stage of a capital murder trial. Appellant specifically challenges the constitutionality of the following portion of Section 701.11:

> . . . the jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt.
>
> . . . .

Our state constitution does not address the role of the jury in sentencing a defendant convicted of a criminal offense. The constitution provides that "the right to trial by jury shall be and remain inviolate . . . " Okl. Const. art. 2, § 19. And that "in all jury trials, the jury shall return a general verdict, and nc law shall require a court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such specific findings. *Id.*, art. 7, § 15. This language is unique to the Oklahoma Constitution. See *Smith v. Gizzi*, 564 P.2d 1009, 1013 (Okl.1977). Further, the provisions of Article 7, § 15, apply to "all jury trials" in the state of Oklahoma. Therefore, we must consider the application of this constitutional language by the Oklahoma Supreme Court.

The same type of legal argument was presented to the Oklahoma Supreme Court regarding the application of Oklahoma's Comparative Negligence Statutes as Appellant has presented here regarding the capital sentencing process. *See Smith v. Gizzi, Id.; Vaught v. Holland,* 554 P.2d 1174 (Okl.1976). In discussing the definitions of "general" and "special" verdicts the court stated:

> The jury under a special verdict is limited to the findings of specified facts and should not know the legal effect of its answers. Defendant is correct that in those states using a special verdict the court may create error by informing the jury of the effect of its answers. However, in Oklahoma, because our verdict must be general, this rule of law has no application. The jury not only must know the legal effect of its findings, but must determine the ultimate result, limited only by the special findings as to each parties degree of negligence. Such special findings are constitutionally and statutorily permitted. Under a general verdict, a jury must know the effect of its answers or it is not a general verdict. Under Oklahoma law the instruction was not error.
>
> A trial court in Oklahoma however, must be cautious in presenting a verdict form to the jury to insure that it is a general verdict. If the verdict is not wholly determinative of the right of recovery the verdict would be special. As long as a jury finds in favor of either plaintiff or defendant, special findings of fact will not deprive the verdict of its generality. 564 P.2d at 1013.

This interpretation is consistent with the legislative definition of the form of verdict in criminal cases set forth

at 22 O.S.1981, § 914, which states "[a] general verdict upon a plea of not guilty, is either 'guilty', or 'not guilty', which imports a conviction or acquittal of the offense charged". The constitutional right to jury trials in Oklahoma relates only to the determination of guilt. Art. 2, § 19. Therefore, the provisions of Article 7, § 15, must be read and applied in that context. This interpretation is consistent with the provisions of Section 914. *Id.*

The law and procedure to be followed in sentencing an individual convicted of a criminal offense is found in the statutory provisions of Title 21 and 22, specifically in 22 O.S.1981, § 926 and 21 O.S.1981, § 701.10. Section 926 provides that in all cases of a verdict of conviction for any offense against the State of Oklahoma, the jury may, and shall upon the request of the defendant assess punishment. While Section 701.10, limited to convictions for first degree murder, provides for a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The challenged portion of Section 701.11 is merely further direction to the jury as to the procedure to be used in determining punishment. Designating the statutory aggravating circumstances found by the jury to support the death sentence does not constitute a verdict with special findings as the result of the jury's second stage deliberations is not a true "verdict". The "verdict" is a determination of the guilt or innocence of the accused, not the determination of the punishment to be imposed. See 22 O.S.1981, §§ 16 and 914.

We have thoroughly examined the Constitution and find no restraints prohibiting the Legislature from enacting statutory provisions governing the sentencing of

defendants convicted of first degree murder. Based on the above analysis, we find, as did the Oklahoma Supreme Court in *Smith*, that the verdicts rendered in accordance with our capital sentencing procedure are general verdicts which comply with the requirements of Art. 7, § 15.

During the second stage of trial, the State sought to prove four aggravating circumstances; 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the murder was especially heinous, atrocious or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Appellant contends that his death sentence should be modified to life imprisonment because at the time of Roger Sarfaty's murder, the aggravating circumstance "especially heinous, atrocious or cruel" was unconstitutionally vague. Roger Sarfaty was found murdered on October 16, 1985. In its 1988 decision of *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the aggravating circumstance of "especially heinous, atrocious or cruel" was constitutionally invalid as applied in that case because 1) the jury was not guided by language sufficient to bridle its discretion and 2) this Court did not cure any unbridled jury discretion by narrowing the application of the aggravating circumstance. 486 U.S. at 363-65, 108 S.Ct. at 1859.

This Court narrowed the interpretation of that particular aggravating circumstance in *Stouffer v. State*, 742 P.2d 562, 563 (Okl.Cr.1987) (Opinion on Rehearing), *cert.*

denied, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988), to apply to instances of death preceded by torture or serious physical abuse. The judicially restricted interpretation was applied to a murder committed in 1985. In *Foster v. State*, 779 P.2d 591 (Ok.Cr.1989), we recognized that the problems underlying the reversal of Cartwright's death sentence stems from the fact that the jury was given incomplete instructions. The instructions did not address the limiting factors previously adopted and mandated by this Court for use with the aggravating circumstance "especially heinous and cruel."

The jury instruction given in the present case, both paragraphs of Oklahoma Uniform Jury Instructions – Criminal No. 436, embodies the limitations which the sentencer must consider in the application and finding of this particular aggravating circumstance. We have reexamined these principles on several occasions and have since consistently applied the narrow construction discussed above. *See Boltz v. State*, 806 P.2d 1117 (Okl.Cr.1991); *Moore v. State*, 788 P.2d 387, 401-402 (Okl.Cr.1990); *Fox*, 779 P.2d at 576; *Fowler v. State*, 779 P.2d 580, 588 (Okl.Cr.1989); *Nguyen v. State*, 769 P.2d 167, 174 (Okl.Cr.1988); *Rojem v. State*, 753 P.2d 359 (Okl.Cr.1988); *Hale v. State*, 750 P.2d 130, 142 (Okl.Cr.1988); *Mann v. State*, 749 P.2d 1151, 1160 (Okl.Cr.1988). Accordingly, we find that this particular aggravating circumstance was applied in a constitutional manner in the present case.

Appellant contends next that the State failed to prove beyond a reasonable doubt the murder was especially heinous, atrocious or cruel. Appellant argues that this particular aggravating circumstance must fall pursuant to our decision in *Brown v. State*, 753 P.2d 908 (Okl.Cr.1988),

as the medical examiner was unable to state which of two potentially fatal wounds, the strangulation or stabbing, was inflicted first.

The evidence supporting a finding that the murder was especially heinous, atrocious or cruel requires proof that the death was preceded by torture or serious physical abuse. *Id.* Doctor Chai Choi, a forensic pathologist with the Office of the Chief Medical Examiner, testified that bruises and abrasions to the decedent's knees and elbows suggested that a struggle had taken place prior to the murder. Ligature marks on the decedent's wrists and ankles indicated that he had been forcefully restrained with his wrists and ankles bound. Injuries to the decedent's head showed that he had been stuck approximately five times with a long blunt object, producing wounds consistent with those created by a baseball bat. She further testified that the cause of death was strangulation, a death which occurred only after three to five minutes of slow suffocation. Dr. Choi also testified that the decedent suffered five (5) stab wounds, two (2) of which were potentially fatal.

In *Brown*, we found insufficient evidence to support a finding that the murder was heinous, atrocious, or cruel as the medial examiner could not state which of the seven gunshot wounds was the fatal wound. This is clearly distinguishable from the present case wherein Dr. Choi testified that the injuries received by the decedent indicated that the strangulation preceded the stabbing. Although some of the bruising and lacerations to the arms and head occurred after the decedent's death, she unequivocally stated that the cause of death was suffocation caused by the strangulation.

When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, the proper test is whether there was any competent evidence to support the State's charge that the aggravating circumstance existed. In making this determination, this Court should view the evidence in the light most favorable to the State. *Brogie v. State*, 695 P.2d 538, 542 (Okl.Cr.1985), *modified on other grounds*, 760 P.2d 1316 (Okl.Cr.1988).

When the evidence is considered in this light, we find it was clearly sufficient. Evidence that the decedent struggled with his assailants, was beaten with a blunt instrument several times and ultimately died of strangulation was sufficient to establish the requisite torture or serious physical abuse necessary to sustain the aggravating circumstance that the murder was heinous, atrocious or cruel. In making this determination, we have specifically excluded the stab wounds inflicted post-mortem. Accordingly, we find that Roger Sarfaty's murder was especially heinous, atrocious or cruel and that the jury's finding of this particular aggravating circumstance was based on substantial uncontradicted evidence.

In his next assignment of error, Appellant alleges that the evidence was insufficient to prove that he killed the decedent for the purpose of avoiding or preventing lawful arrest or prosecution. The existence of this aggravating circumstance is determined by looking at the killer's intent. *Williamson v. State*, 812 P.2d 384, 407 (Okl.Cr.1991); *Fox*, 779 P.2d at 576, *Fowler*, 779 P.2d at 588, *Stouffer v. State*, 738 P.2d 1349, 1361-1362 (Okl.Cr.1987), *Moore v. State*, 736 P.2d 161, 165 (Okl.Cr.1987). In the absence of his own statements of intent, such evidence may be inferred

from circumstantial evidence. *Rojem,* 753 P.2d at 368; *Banks,* 701 P.2d at 426.

Evidence presented by the State showed that Appellant knew Sarfaty, planned to rob him, and because Sarfaty knew him, Appellant would have to kill him to keep from being caught. We find this sufficient evidence from which a rational juror could have found beyond a reasonable doubt the existence of this aggravating circumstance.

In his thirteenth assignment of error Appellant contends that the aggravating circumstance "continuing threat" must be set aside and the death sentence vacated as the principles of double jeopardy and collateral estoppel bar the jury's finding of this aggravator. At the time of the present trial, Appellant and co-defendant Woodruff had been previously tried by jury and convicted of the murder of Lloyd Thompson. During the Thompson trial, the State presented evidence of the Sarfaty homicide in the second stage to support the aggravating circumstance that the defendants constituted a continuing threat to society. The jury in that trial rejected that aggravator. Appellant now argues that the State is precluded from using that same evidence in the instant case to determine whether Appellant constitutes a continuing threat to society.

In *Ashe v. Swenson,* 397 U.S. 436, 442, 90 S.Ct. 1189, 1193, 25 L.Ed.2d 469, 475 (1970), the Supreme Court stated that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuits." The Court held that collateral estoppel was not

only a requirement of due process, but was a part of the Fifth Amendment's guarantee against double jeopardy.

The Double Jeopardy prohibition constitutionally guaranteed by the Fifth Amendment to the United States Constitution and Article 2, § 21, of the Oklahoma Constitution applies only to an individual's right not to be placed twice in jeopardy for the same offense. While the doctrine of collateral estoppel, adopted by the Court in *Ashe,* is much broader and applies to the adjudication by a trier of fact that the accused was not the person who committed the acts comprising the charged offense or that the accused had not committed an essential element of a separate and distinct offense. The foundational question which must be answered in determining the applicability of collateral estoppel is whether there has been a prior adjudication by a trier of fact which in effect acquits the accused of the specific charged offense or an essential element of a separate and distinct offense. *See Ellis v. State,* 834 P.2d 985 (Okl.Cr.1992); *White v. State,* 821 P.2d 378 (Okl.Cr.1991) (Lumpkin, J. concurring in results).

In *Buckaloo v. State,* 650 P.2d 885 (Okl.Cr.1982), the State sought to enhance the defendant's punishment for second degree burglary with three prior felony convictions. The jury declined to find the defendant guilty of the former convictions. Subsequently, the defendant was charged and tried for first degree robbery. At the robbery trial, the State again sought to enhance punishment with the same three felony convictions used in the prior trial. The defendant argued that the previous jury's refusal to find him guilty of the former convictions estopped the State from using the same three convictions for enhancement purposes in all subsequent prosecutions.

This Court disagreed with the defendant's argument stating that the determination of punishment in one case, using the facts of another case, is not a decision of ultimate fact in the cases used for enhancement. *Quoting Jordan v. State,* 327 P.2d 712 (Okl.Cr.1958), we said that providing enhanced punishment for second and subsequent offenses does not create or define a new or independent crime, but describes circumstances where one found guilty of a specific crime may be more severely penalized because of his previous conviction. 650 P.2d at 887. In *Johnson v. District Court of Oklahoma County,* 653 P.2d 215, 219 (Okl.Cr.1982) we stated:

> Furthermore, during the sentencing stage of a capital case, the court or jury may consider relevant evidence that might not otherwise be admissible at trial, i.e., evidence of other crimes, and prior convictions. There must be due process limitations on the introduction of this evidence during the sentencing stage. However, the consideration of this evidence does not constitute double jeopardy. The defendant is not being punished a second time for the same offense; instead, the evidence is used to establish the defendant's character and criminal propensities which may justify the imposition of the death penalty. 653 P.2d at 218-219.

Based upon the foregoing, we find that the use of evidence of the Sarfaty homicide to prove "continuing threat" was not prohibited under the doctrine of collateral estoppel. The jury's consideration of the evidence of Sarfaty's murder during the second stage of the Thompson trial was not a final decision on the ultimate

issue of Appellant's guilt or innocence of Sarfaty's murder. As we stated in *Johnson,* "To find otherwise, would abrogate the legislative intent to hold a defendant responsible for his separate and distinct acts of criminal misconduct." 653 P.2d at 219. This assignment of error is therefore denied.

In his fourteenth assignment of error Appellant challenges the application of the aggravating circumstance of "continuing threat" arguing that the circumstance is unconstitutionally vague as applied and that the instructions given to the jury failed to adequately channel the sentencer's discretion. Appellant has properly preserved this issue for appellate review as he submitted two (2) proposed jury instructions to the court.[4]

However, we have previously analyzed and upheld this aggravating circumstance finding it specific, not vague, and readily understandable. *Boltz,* 806 P.2d at 1125; *Munson v. State,* 758 P.2d 324, 335 (Okl.Cr.1988); *Liles v. State,* 702 P.2d 1025, 1031 (Okl.Cr.1985); *VanWoundenberg v. State,* 720 P.2d 328, 336 (Okl.Cr.1986), *cert. denied,* 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986).

We are not now persuaded to alter that position. Accordingly, this assignment of error is denied.

In his fifteenth assignment of error Appellant contends that the trial court erred in admitting any evidence

---

[4] Defendant's proposed Instruction No. 13 defined the term "society" and proposed Instruction No. 18 instructed the jury to look to the Appellant's background, psychological studies and demeanor at trial to see if there were indicators that would support the circumstance. (O.R. 272, 278)

of his conviction for the Thompson murder as it was not a final conviction and was then pending on appeal. To prove the aggravating circumstance of "continuing threat" the State presented evidence of the Thompson murder, specifically testimony by Thompson's neighbor concerning her observations the day of the homicide, the autopsy report reflecting the pathological diagnoses of the victim and photographs and fingerprints showing that the defendant in that case was in fact the Appellant. The fact that Appellant's conviction for this murder was not final does not affect the admissibility of evidence of the offense. In *Johnson v. State*, 665 P.2d 815, 822 (Okl.Cr.1982), this Court held:

> Evidence of a defendant's criminal record, or prior unadjudicated acts of violent conduct is relevant to the determination of whether the defendant is likely to commit future acts of violence that would constitute a continuing threat to society. . . . It is not necessary there be a final conviction for an unrelated criminal offense to be admissible at the sentencing stage.

See also *VanWoundenberg v. State*, 720 P.2d at 337.

Our decision is not altered by the fact that Appellant's conviction for the Thompson homicide has been reversed and remanded for a new trial. See *Romano v. State*, 827 P.2d 1335 (Okl.Cr.1992). As the case was not reversed on the basis of insufficient evidence of guilt, the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence. Contrary to Appellant's argument, this decision is not violative of the dictates of *Johnson v. Mississippi*, 486 U.S.

578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), wherein the Supreme Court specifically declined to review the possible relevance of the conduct giving rise to the prior conviction which had been set aside as no evidence describing that conduct had been presented to the jury.

However, the same cannot be said of the judgment and sentence and docket sheet from the Thompson case. This evidence was admitted to show that a prior conviction had been obtained and that it was not final but on appeal. As that prior conviction has fallen, the judgment and sentence is no longer proper support for the "prior violent felony" aggravating circumstance. Therefore, this aggravator falls.

In his seventeenth assignment of error Appellant argues that he is entitled to a modification of his sentence should one aggravator fall because this Court's practice of reweighing aggravating circumstances versus mitigating evidence usurps the jury's function. Specifically, he argues that reweighing is unconstitutional because it deprives the defendant of the right to be sentenced by a jury of his peers and applied to this case would be a violation of the prohibition against *ex post facto* laws. This argument has previously been rejected in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

In *Castro v. State*, 749 P.2d 1146, 1148 (Okl.Cr.1987) *cert. denied*, 485 U.S. 971, 108 S.Ct. 1248, 99 L.Ed.2d 446 (1988) we determined that the potential reevaluation of the defendant's sentence during direct appeal proceedings does not encroach upon his right to jury sentencing and permits this Court to affirm the death sentence even

if one aggravating circumstance fails. Although the capital sentencing statutory scheme does provide for jury sentencing, it also provides for sentence review by the Court and for review by the state district court and his Court through post-conviction procedures. 21 O.S.Supp. 1985, § 701.13; 22 O.S.1981, § 1080 *et seq.* The *ex post facto* claim was also specifically rejected in *Castro*, as we stated that reweighing the aggravating circumstances against the mitigating evidence was procedural and does not criminalize innocent conduct nor increase the crime. 749 P.2d at 1150-1151. Accordingly, this assignment of error is denied.

Appellant further argues that sentence of death is unreliable because the jury's sense of responsibility was diminished by acts of the trial court and the prosecutor. Specifically, Appellant directs our attention to the trial court's direction to the jury during voir dire that their function was to recommend punishment, the fact that reflected in the judgment and sentence for the Thompson murder was Appellant's sentence of death, and a comment by the prosecutor during closing argument to "put the defendant on death row".

The jury has the prime responsibility for deciding whether the death penalty should be imposed. We must be cautious to avoid any actions or directions which would tend to reduce the jurors' sense of responsibility for their decision. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct.2633, 86 L.Ed.2d 231 (1985), the Supreme Court stated that the constitution prohibits imposition of a death penalty which rests on a "determination made by a

sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 472 U.S. at 328-329, 105 S.Ct. at 2639. No such misconception exists on this record. During voir dire, the trial court asked each prospective juror in part: "If you find beyond a reasonable doubt that the Defendants are guilty of Murder in the first degree, your duty is to determine whether or not, considering the evidence, you should recommend death."

We find no error as this is a proper statement of the law. See 22 O.S.1981, § 961 *et seq.*, § 1001 *et seq.* Further, in light of the explicit instructions given during second stage, nothing in the court's conduct can be said to have diverted the jury from its "awesome responsibility." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.

Learning that the defendant had previously received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of their decision. However, when the jury is properly instructed as to its role and responsibility in making such a determination we cannot, on appellate review, conclude that the jury in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise.

In the present case, the importance of the jury's role at sentencing is evident from the instructions. The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. They were informed of their role as factfinders, that the weight and value of testimony and evidence was for them to determine, that they should not surrender their own

judgment to that any witness or item of evidence, and of their duty to follow the law in reaching their conclusion. It was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence.

The "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Reviewing the sentencing determination in the present case under this heightened standard, but also with a presumption of correctness, we find no reason to question the jury's conclusion. While evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense, the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process.

Further, the prosecutor's request of the jury to put the defendants on death row is not violative of the *Caldwell* rule. This brief remark was simply a way of asking the jury to impose the death penalty. We do not find that this comment in any way lead the jury to believe that the ultimate responsibility for the defendants' fate rested

elsewhere. Accordingly, this assignment of error is denied.

Appellant offered evidence in mitigation of his completion of numerous bible study courses and the testimony of the jail's chaplain concerning his religious accomplishments. On re-direct examination, defense counsel asked Helen Pearce, Assistant Chaplain in the Oklahoma County Jail, if she felt that Appellant was involved in "jailhouse religion" or if she felt it was something more. The prosecutor's objection was sustained. Appellant now objects to that ruling, to the use of the term "jailhouse religion" in the prosecutor's closing argument, and to jury instructions which directed consideration of aggravating circumstances in mandatory terms but consideration of mitigating evidence in permissive terms.

Initially, we find that the trial court properly precluded Ms. Pearce from giving her personal opinion as to Appellant's religious commitment. Such testimony called for mere speculation on the part of the witness and was not helpful to a clear understanding of the issue. See 12 O.S.1981, § 2701. Further, we find no error in the prosecutor use of the term "jailhouse religion" during closing argument. The comments in the State's closing argument were reasonable inferences based upon the term as brought up during the testimony of Ms. Pearce. Moreover, the remark was not met with an objection by the defense during closing argument.

Further, the jury was not prevented from considering any relevant mitigating evidence. Instruction No. 9 informed the jury that "mitigating circumstances are

those, which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame." The jury was further told that the determination of what was mitigating evidence was for them to determine. Instruction No. 10 provided a list seventeen (17) specific items which the jury could consider as evidence to mitigate Appellant's punishment. The jury was instructed that whether the listed circumstances existed and whether they were mitigating evidence was their decision. The jury was also provided a list of the aggravating circumstances which the State sought to prove against the Appellant. Instruction No. 7 informed the jury that the defendant is presumed innocent of the charges made in the Bill of Particulars and it is the burden of the State to prove beyond a reasonable doubt the aggravating circumstances alleged. Additional instructions informed the jury that it could only recommend a death sentence upon a unanimous finding of the existence beyond a reasonable doubt of one or more aggravating circumstance or circumstances, and upon a unanimous finding that any such aggravating circumstance or circumstances outweighed the finding of mitigating circumstances. 21 O.S.Supp.1987, § 701.11.

We find that the instructions given in the present case do not direct the jury to disregard any mitigating evidence. Rather, the instructions provide the fullest possible latitude for the consideration of evidence in mitigation. The jury was not prohibited in any way from considering any and all relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). As the instructions given adequately apprised the jury of the method by which it should

determine the sentence against the defendant, this assignment of error is denied.

Appellant further alleges in his eighteenth assignment of error that the trial court erred in failing to instruct the jury that it had the option to return a life sentence regardless of its findings respecting aggravating and mitigating circumstances. Reviewing for fundamental error only as the Appellant failed to request such an instruction, we find no error warranting reversal or modification of sentence.

In *Walker v. State*, 723 P.2d 273, 284 (Okl.Cr.1986), the appellant claimed error in the refusal to give his requested instruction on "jury nullification". Defined as "the jury's exercise of its inherent 'power to bring in a verdict of [acquittal] in the teeth of both the law and facts' ", we found that most courts have uniformly held that a defendant is not entitled to such an instruction. *See also Williamson v. State*, 812 P.2d at 410. We find no error in the omission of this instruction.

Appellant contends in his nineteenth assignment of error that the trial court erred in instructing the jury not to allow sympathy, sentiment or prejudice to enter into its deliberations. This argument was rejected in *Fox v. State*, 779 P.2d at 574-575. We are not persuaded to deter from that position. *See also Williamson*, 812 P.2d at 408; *Moore v. State*, 788 P.2d 387, 401 (Okl.Cr.1990). Accordingly, this assignment of error is denied.

In his twenty-first assignment of error Appellant alleges that the trial court failed to properly instruct the jury concerning the burden of proof and the manner in

which to weigh the aggravating circumstances and mitigating evidence. Specific standards for balancing aggravating and mitigating circumstances are not constitutionally required. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See also Walker v. State*, 723 P.2d at 284; *Brogie v. State*, 695 P.2d at 544. The instructions given to the jury properly advised them to weigh the aggravating circumstances against the mitigating evidence. Instructions No. 8 through 12 comprehensively informed the jury that a finding of the aggravating circumstances beyond a reasonable doubt is not by itself enough to assess the death penalty. Rather, the aggravating circumstances must clearly outweigh the mitigating, or death may not be imposed. Similar instructions have passed constitutional muster. *See Davis v. State*, 665 P.2d 1186, 1202 (Okl.Cr.1983).

Further, the trial court properly denied Appellant's requested instruction which placed a "beyond a reasonable doubt" standard on the ultimate life or death determination. In *Johnson v. State*, 731 P.2d 993 (Okl.Cr.1987), we held that the burden of proof analysis is not strictly applicable to the weighing process. Quoting to *Daniels v. State*, 453 N.E.2d 160 (Ind. 1983), we stated that while the State must prove beyond a reasonable doubt the existence of at least one of the enumerated aggravating circumstances, the determination of the weight to be accorded the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt. Instead, it is a balancing process. 731 P.2d at 1005.

In his twenty-fourth assignment of error, Appellant contends that Oklahoma's death penalty statutes are unconstitutional as they allow unbridled prosecutorial

discretion in seeking the death penalty. Appellant argues that, aside from the statutory aggravating circumstances, statutes provide no guidelines for determining when prosecutors should seek the death penalty. Because of the lack of adequate guidelines, Appellant continues, the decision whether or not to seek the death penalty will, and does to a great degree, depend on the whim of the individual prosecutor. A similar argument was raised in *Crumley v. State*, 815 P.2d 676 (Okl.Cr.1991). We preface our remarks here, as we did in *Crumley*, with the notation that we do not take allegations like these lightly, however, Appellant has provided nothing in support of his theory except unsubstantiated speculation.

The decision regarding which criminal charge to bring lies within the wide parameters of prosecutorial discretion. *Gray v. State*, 650 P.2d 880, 882 (Okl.Cr.1982). See also *Dangerfield v. State*, 742 P.2d 573 (Okl.Cr.1987). However, prosecutorial discretion is not unlimited. In *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978), the Supreme Court stated;

> the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.

Nor do we find such selectivity in itself to be a state constitutional violation. Limits on this discretion exist by virtue of the statutory schemes governing criminal law as well as those governing the practice of law. See *Ray v. State*, 510 P.2d 1395 (Okl.Cr.1973) (wherein this Court adopted the American Bar Association Standards for

Criminal Justice). See also 5 O.S.1981, Ch. 1, App. 3 DR 7-103(A) and 5 O.S.Supp. 1988, Ch. 1, App. 3A, Rule 3.8. Rules of Professional Conduct (prohibiting a prosecutor from bringing charges unless supported by probable cause). Prosecutors are presumed by law to act in good faith when determining which crimes to prosecute and which punishments to seek. *United States v. Blitstein*, 626 F.2d 774 (10th Cir.1980); *United States v. Bennett*, 539 F.2d 45 (10th Cir.1976), *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976).

As the Tenth Circuit Court of Appeals stated in *Blitstein* "It is the obligation of a criminal defendant to demonstrate that the government's prosecution of him was based upon impermissible discriminatory grounds . . . " *Id.* at 782. We find that in the present case, the Appellant has failed to make such a showing and that when the statutes and case law are considered together, sufficient guidelines exist to properly direct prosecutorial discretion in making the decision whether to seek the death penalty.

Finally, Appellant argues that the one thousand year prison sentence for the Robbery is excessive. It is well settled that the question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rogers v. State*, 507 P.2d 589, 591 (Okl.Cr.1973). This Court does not have the power to modify a sentence unless we can conscientiously say that under all the facts and circumstances that the sentence is so excessive as to shock the conscience of the Court. *Huntley v. State*, 750 P.2d 1134, 1136 (Okl.Cr.1988).

Appellant's prior felony convictions and the violent manner in which the robbery was committed support the sentence. Accordingly, this assignment of error is denied.

V. MANDATORY SENTENCE REVIEW

Pursuant to 21 O.S.Supp.1987, § 701.13(C), we must determine (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of an aggravating circumstance as enumerated in 21 O.S.1981, § 701.12. As noted above, the aggravating circumstance of prior felony conviction involving the use or threat of violence has not been supported by the evidence and therefore falls. In *Stouffer v. State*, 742 P.2d at 564 this Court held that an independent reweighing of aggravating circumstances and mitigating evidence is implicit to our statutory duty to determine the factual substantiation of the verdict and the validity of the death sentence. See also *Battenfield*, 816 P.2d at 564; *Sellers*, 809 P.2d at 691; *Castro*, 749 P.2d 1146. In *Clemons*, 494 U.S. at 749-751, 110 S.Ct. at 1449, the Supreme Court found nothing in appellate weighing or reweighing of the aggravating circumstances and mitigating evidence that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence. The Court further stated that appellate courts are not hindered in performing this function without written jury findings concerning mitigating circumstances.

We have already found the evidence sufficient to support the jury's finding of the other aggravating circumstances found by the jury, i.e. that the murder was especially heinous, atrocious or cruel; that the murder was committed to avoid lawful arrest or prosecution, and that the Appellant constitutes a continuing threat to society. Evidence in mitigation presented in this case consisted of testimony from Appellant's family members concerning Appellant's childhood, including the trauma experienced when he was fourteen by the divorce of his parents; the love and support of family and friends; his record of being a good worker; his status as a trustee in the county jail and role as problem solver; his completion of bible study courses and involvement in the jail ministry; and his prospects for rehabilitation.

Discarding the evidence supporting the "prior violent felony conviction" aggravating circumstance, and carefully weighing the remaining aggravating circumstances against the mitigating evidence presented at trial, we find the sentence of death to be factually substantiated and appropriate.

Finding no error warranting reversal or modification, the judgments and sentences for Robbery with a Dangerous Weapon, After Former Conviction of a Felony and First Degree Murder are AFFIRMED.

LANE, P.J., and JOHNSON, J., concur.

BRETT, J., not participating.

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

JOHN JOSEPH ROMANO,	)	
	)	
Petitioner,	)	No. F-87-441
-vs-	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING REHEARING AND DIRECTING ISSUANCE OF MANDATE

Petitioner has filed a Petition for Rehearing requesting this Court grant rehearing in *Romano v. State*, ___ P.2d ___, 65 OBJ 150 (Okl.Cr. January 11, 1993). He raises several allegations of error which he claims were either overlooked by this Court in its opinion or that were resolved in conflict with controlling case law. We have reviewed these allegations and find they were fully addressed in our opinion and that our decision is not in conflict with prevailing law. Therefore, Petitioner is not entitled to rehearing on these issues. *See* 22 O.S.Supp.1989, Ch. 18, App. Rules of the Court of Criminal Appeals, Rule 3.14(B)(2).

Petitioner further requests that this petition be considered by the entire Court en banc and that a new oral argument be heard before the Court en banc. He argues that he deprived of due process and equal protection of the law as the decision in this case was rendered by only three members of the five judge court. Petitioner offers no authority for his argument other than a review of prior death penalty cases considered by the Court "in full". Title 20 O.S.Supp.1987, § 31, states in pertinent part:

> The Court of Criminal Appeals shall consist of five (5) Judges, any three of whom shall constitute a quorum and the concurrence of three Judges shall be necessary to a decision of said Court.

We find that under the above language an opinion may be handed down from this Court with the consideration of a minimum of three judges, and that in so doing an appellant is not deprived of his rights to due process and equal protection under the law. Therefore, Petitioner is not entitled to a rehearing on this issue.

Based upon the foregoing, this Motion for Rehearing is **DENIED.**

The Clerk of this Court is ordered to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 17th day of March, 1993.

/s/ Gary L. Lumpkin
GARY L. LUMPKIN, Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Vice-Presiding Judge

/s/ James F. Lane
JAMES F. LANE, Judge

/s/ Charles S. Chapel (Specially Concurring)
CHARLES S. CHAPEL, Judge

ATTEST:
/s/ Illegible
(Clerk)

Supreme Court of the United States

No. 92-9093

John Jospeh [sic] Romano,
Petitioner

v.

Oklahoma

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Oklahoma.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?"

November 1, 1993

---

(5)

No. 92-9093

In The

Supreme Court of the United States

October Term, 1993

JOHN JOSEPH ROMANO,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The
Court Of Criminal Appeals Of Oklahoma

BRIEF FOR THE PETITIONER

LEE ANN JONES PETERS*
ROBERT A. RAVITZ
JULIA SUMMERS
JAMES DENNIS

Office of the Public Defender
of Oklahoma County
320 Robert S. Kerr, Rm. 611
Oklahoma City, OK 73102
Telephone: (405) 278-1550

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

54 pp

QUESTION PRESENTED

Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

OPINION BELOW

The Court of Criminal Appeals of the State of Oklahoma affirmed the conviction for first-degree murder and sentence of death in an opinion rendered on January 13, 1993, *John Joseph Romano v. State of Oklahoma*, 847 P.2d 368 (Okla. Crim. App. 1993). The opinion is reproduced in the Joint Appendix (hereinafter "J.A.") 15.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1257(3) (1990), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

Rehearing of the issues decided by the January 13, 1993, opinion of the Oklahoma Court of Criminal Appeals was denied on March 17, 1993. The petition for certiorari was filed on June 14, 1993, and granted on November 1, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It also involves the Due Process Clause of the Fourteenth Amendment (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It further involves the following provisions of Oklahoma law: Okla. Stat. tit. 21, § 701.11 (1981):

> In the sentencing proceeding, the statutory instructions as determined by the judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. tit. 21, § 701.12 (1991):

> Aggravating circumstances shall be:
>
> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

> 2. The defendant knowingly created a great risk of death to more than one person;
>
> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> 4. The murder was especially heinous, atrocious, or cruel;
>
> 5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
>
> 6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
>
> 7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
>
> 8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

STATEMENT OF THE CASE

On January 30, 1987, Petitioner John Joseph Romano was sentenced to death for the murder of Lloyd Thompson in Oklahoma County District Court Case No. CRF-86-3920. One day before the sentence was formally

imposed for that murder, he was charged with the unrelated murder of Roger Sarfaty in Oklahoma County Case No. CRF-86-1231. The Petitioner was convicted of that murder as well. The sentence of death in the Thompson case was used to obtain a sentence of death in the Sarfaty case. This writ of certiorari concerns the second sentence of death.

In the Sarfaty case, the State sought and obtained the death penalty on the basis of four aggravating circumstances: 1) the Petitioner previously had been convicted of a felony involving the use or threat of violence to the person (specifically, the murder of Lloyd Thompson); 2) the murder was heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) a probability existed that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. (R. 23-24).

Most of the proof offered by the State in the penalty phase was by stipulation or documentary evidence. The parties stipulated that the defendant had been convicted of First-Degree Murder; to a portion of the autopsy report on Lloyd Thompson that explained the manner of death; that J.T. Rupe would testify that the defendants named in the prior convictions were the same defendants now on trial;[1] and that Officer McCornack of the Oklahoma City Police Department would testify that he saw wounds and

[1] Evidence of convictions for Obtaining Money by False and Bogus Check and Second-Degree Forgery were admitted to enhance the penalty for the robbery conviction.

blood on Lloyd Thompson's hands. (May 26, 1987, Tr. 45-47) [hereinafter Tr. VI].

The State also introduced the Judgment and Sentence from the Thompson murder conviction. That document revealed not only that the Petitioner had been convicted of first-degree murder, but also that he had been sentenced to death for that crime. The document also showed that an execution date had been set for April 20, 1987, which was approximately one month before the jury heard the present case.[2] Defense counsel objected to admission of the document on the grounds that it was improper support for the "prior violent felony" aggravating factor because the judgment was not final and further that the Thompson murder was committed after the present one. (Tr. VI 30, 32, 41).[3] After the trial court overruled these objections, defense counsel objected to admission of the Judgment and Sentence on the further ground that even if the conviction itself was admissible, the sentence he had received was not proper for the jury to consider. (Tr. VI 44). Although the parties stipulated that the Petitioner had been convicted of murder, (Tr. VI 45), the trial court nevertheless admitted the objectionable Judgment and Sentence document. (Tr. VI 46).

[2] The Judgment and Sentence directed the Warden to put the petitioner to death on April 20, 1987. (J.A. 6). Trial began in this case on May 18, 1987.

[3] Although both issues were raised on direct appeal and were matters of first impression in Oklahoma, the court did not address them as they were rendered moot by the invalidation of this aggravating circumstance on another ground.

Additionally, the State presented the testimony of several witnesses. Olie Irvin, who lived in the apartment below Lloyd Thompson, testified that on the day he was murdered, she saw him with someone fixing a tire on his car. When they finished, they went upstairs. (Tr. VI 26). She heard banging and knocking that persisted for five to seven minutes, and loud music. (Tr. VI 27). She did not identify anyone as the person whom she saw with Mr. Thompson.

Greg Myers, Petitioner's cellmate while he was waiting to be tried for the Lloyd Thompson murder, claimed that Petitioner admitted that he and his partner killed a man and that Petitioner offered to pay Mr. Myers money to kill some unnamed witnesses.[4] (Tr. VI 51-54).

Finally, Pat Stanley testified that Petitioner lived with her daughter, and that he did not act unusual the afternoon of July 19, 1986. (Tr. VI 60-61). In addition to this testimony, all of the evidence offered in the first stage of the trial was incorporated by reference. (Tr. VI 62).

Numerous people testified on Petitioner's behalf in the sentencing phase. Charles Vasquez, who had shared a cell with Petitioner and Greg Myers, testified that Greg Myers repeatedly offered to kill witnesses for $300. No one, including Petitioner, ever took him up on his offer. (Tr. VI 65).

---

[4] While this case was on appeal, Mr. Myers recanted his testimony. He signed an affidavit swearing that none of his testimony was true, that he fabricated the story to curry favor with the District Attorney on charges pending against him, and that Petitioner never talked about his case.

James Romano, Petitioner's father, gave the jury a glimpse of his son's life. Petitioner, the oldest of four children, had a normal childhood and no problems at school until his parents divorced when he was fourteen years old. The divorce wrought turmoil, especially for Petitioner. He shuffled back and forth between his parents and started having problems in school. (Tr. VI 68-70).

Mr. Romano described his son as a normal, friendly, easy going, happy-go-lucky, very likeable boy. Despite having problems in school, he did graduate. (Tr. VI 72-73). Mr. Romano described the jobs his son held and the responsible way in which he repaid loans. (Tr. VI 73-77). Father and son enjoyed a good relationship. (Tr. VI 75). When Petitioner was convicted in 1984, his father was very upset, but their relationship remained about the same. (Tr. VI 77). Mr. Romano told the jury that although he did not condone everything his son had done, he loved him and did not want anything bad to happen to him. If his son were given a life sentence, he would visit him in the penitentiary and correspond with him. (Tr. VI 78).

Petitioner's mother, Patricia St. Clair, also testified about the adverse effect the divorce had on her son. After the divorce, she felt she lost control of him and suspected he was involved in drugs. The divorce was so bitter that she and Petitioner's father could not communicate. They let Petitioner go back and forth between their homes as he desired. (Tr. VI 88-89). Although he had problems in school, he finished high school by participating in a program that allowed him to go to school four hours per day and work full-time. (Tr. VI 89-90).

Mrs. St. Clair described the positive changes she had observed in her son since his incarceration. Since becoming a Christian, he had become a source of encouragement to her. (Tr. VI 92). She told the jury that her son had always been an important part of her life, that she loved him very much. If the jury would give him life, she would continue to communicate with and visit him. (Tr. VI 93).

David Oliver, a local businessman, testified that of the two or three hundred salespeople he had known over the last seventeen years at the car dealership where Petitioner worked, he impressed him as the most enthusiastic. Petitioner was eager to learn the business and showed much potential. (Tr. VI 80). Around 1984, however, he began running with a crowd involved with drugs. (Tr. VI 81, 83).

Charlie Greeson, an Oklahoma County Deputy Sheriff, knew Petitioner through his position as night jailer. During the eight months he had known Petitioner, he found him to be a good prisoner. Petitioner helped hold down trouble in the tanks. When a problem arose with a particular prisoner, he was asked to help out and did. (Tr. VI 84-85). Jerry Waynescott, another deputy sheriff assigned to the jail, echoed the testimony of Deputy Greeson. He recounted how Petitioner worked as a trustee, cleaned the cell and helped keep trouble down. (Tr. VI 93-94). Deputy Milton Hoskins' testimony was basically the same. (Tr. VI 95-96).

John Lowery, the inmate Petitioner had been asked to help, testified that he had been almost suicidal when he was returned to jail after being sentenced for second-degree manslaughter when someone died from drinking

moonshine whiskey. When the chaplain's assistant was unable to help him through his crisis, she called in Petitioner, who convinced him suicide was not the answer, helped him calm down, and afterward continued to counsel him. (Tr. VI 109-10). He declared that "[i]f it wasn't for John Romano I don't know what I would do." (Tr. VI 111).

Helen Pearce, an assistant chaplain in the Oklahoma County jail, had worked closely with Petitioner for almost a year. (Tr. VI 96-99). She had watched him grow as a person, develop and mature in his honesty and his character. He is the only person for whom she had ever been willing to be a character witness, and the only person for whom she had spent her own money to buy additional Bible study courses. Petitioner had completed 136 such courses at the time of trial and was working on another. (Tr. VI 99). She testified that Petitioner was deeply committed to a different way of life and that his goals had totally changed. (Tr. VI 100).

Sam House, chaplain of the Oklahoma County jail, characterized Petitioner as being very unstable and nervous when he first arrived in jail. (Tr. VI 103-04). Since that time, Chaplain Sam had witnessed a tremendous change in Petitioner's spiritual life. He was the first inmate to complete all 136 Bible correspondence courses. (Tr. VI 105). Chaplain Sam was so confident of Petitioner's religious convictions that he "would stake [his] life on it." Responding that John's life had more meaning to him "than you will ever know," he expressed the hope that the jury would not sentence Petitioner to death. (Tr. VI 107).

Petitioner personally told the jury about his life. He started working at age fifteen. (Tr. VI 115). After graduating from high school, he continued to work steadily. (Tr. VI 117-19, 122-25). When he was nineteen or twenty years old, he met a man who recruited him to run poker and blackjack games and sell quaaludes and speed. (Tr. VI 119). After a time, Petitioner joined the Air Force, but knee problems soon led to an honorable discharge. (Tr. VI 121-22). He had stopped using and selling drugs, but eventually returned to his previous lifestyle. (Tr. VI 122-23). Before long, he was convicted of forgery. (Tr. VI 125).

On the subject of this crime, Petitioner testified that he did not rob or kill Roger Sarfaty, and that he was not involved in the killing in any way. (Tr. VI 139). Contrary to first-stage witness Tracy Greggs' testimony, it was Greggs who had asked him to participate in robbing and killing Sarfaty, not vice-versa. (Tr. VI 136-37). Petitioner explained that the quarters[5] he had at Quail Springs Mall on October 12 were left over from playing blackjack the night before at the Stork Club. (Tr. VI 137, 143). On cross-examination, the State also questioned Petitioner about the Lloyd Thompson murder. Petitioner admitted that he was present when Mr. Thompson was killed, but denied participating in the killing. (Tr. 143-44).

Petitioner described how his life had changed since his arrest on a murder charge. He spoke of his spiritual

[5] Part of the circumstantial evidence offered at the guilt stage was that quarters were missing from the victim's apartment and that petitioner was seen with numerous quarters in a shopping mall around the time of the victim's death.

development and proudly identified the many certificates for completion of Bible courses. (Tr. VI 126-30). He told the jury that if his life was spared, he hoped to help other inmates to improve their lives. (Tr. VI 140). His goal was to live peacefully. (Tr. VI 136).

While the appeal from the conviction for the murder of Roger Sarfaty was pending in the Oklahoma Court of Criminal Appeals, that court reversed the murder conviction and accompanying death sentence for the killing of Lloyd Thompson and remanded the case for a new trial.

On direct appeal from the Sarfaty murder conviction the Petitioner argued that the sentence of death stood in violation of the Eighth Amendment because the jury's sense of responsibility was diminished by its knowledge that Petitioner already was under a death sentence, in addition to certain other acts and comments by the trial court and the prosecutors. The Oklahoma Court of Criminal Appeals agreed with Petitioner that the fact that he had been sentenced to death by another jury was irrelevant. The court also conceded that the jury's learning a defendant had been previously sentenced to death for a different murder "could diminish the jury's sense of importance of its role and mitigate the consequences of their decision." 847 P.2d at 390. Despite recognizing the error's potential to diminish the jury's sense of responsibility, the court presumed the jury's judgment to be correct and held that it was "highly unlikely" that this error had such effect because the jury had received instruction on its responsibility to weigh the evidence and to follow the law. The court further held that the erroneous "admission of this evidence did not so infect the sentencing determination with unfairness as to make

the determination to impose the death penalty a denial of due process." The death sentence was affirmed. 847 P.2d at 390-91.

SUMMARY OF ARGUMENT

Admission of evidence that the Petitioner had been sentenced to die for another murder plainly informed the jury that the determination of whether the Petitioner would live or die for his crimes already had been made by another jury. Consideration of Petitioner's capital sentence sapped the jury's sense of responsibility by leading the jury to believe that its decision, whether it be life imprisonment or death, would make no difference. Consequently, there is a danger jurors did not consider the mitigating evidence proffered.

Moreover, this evidence was misleading, materially inaccurate, and wholly irrelevant. There was no reason for its admission, and compelling reasons for its exclusion. Because it is impossible to determine that admission of this evidence had no effect on the jury's determination, the sentence of death is unreliable.

ARGUMENT

THE JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF THE DEFENDANT'S DEATH WAS IMPERMISSIBLY AND NEEDLESSLY UNDERMINED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY ADMISSION OF TOTALLY IRRELEVANT EVIDENCE THAT CREATED A BIAS IN FAVOR OF THE DEATH PENALTY.

Opinions by this Court have firmly established that reliability of sentencing in capital cases is indispensable under the Eighth Amendment. Recognition of the need for reliability of sentencing in capital cases flows out of the concerns expressed by Justices White and Stewart in *Furman v. Georgia*, 408 U.S. 238 (1972). "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Id.* at 306 (Stewart, J., concurring). Moreover, unless a death sentence is reliable, there is "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

Just as reliability is essential to the Eighth Amendment, essential to reliability is a sentencer who "treat[s his] power to determine the appropriateness of death as an 'awesome responsibility.' " *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985). The jurors in the instant case were prevented from treating their power to determine the

appropriateness of Petitioner's death as an "awesome responsibility" by the admission of evidence that informed them that Petitioner was going to be executed regardless of their decision. Admission of evidence that a capital defendant already has been sentenced to death thus undermines the sentencer's sense of responsibility, creates a bias in favor of death, and strips the death sentence of reliability.

A. ADMISSION OF EVIDENCE THAT THE PETITIONER ALREADY HAD BEEN SENTENCED TO DEATH IMPERMISSIBLY UNDERMINED THE JURY'S SENSE OF RESPONSIBILITY AND CREATED A BIAS IN FAVOR OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

1. Evidence of the preexisting death sentence led the jury to believe the responsibility for Petitioner's death rested elsewhere and invited it to defer to the decision already made by another jury.

This Court has acknowledged that "[i]n evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of **determining whether a specific human being should die** at the hands of the State," and that "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion with – and indeed as indispensable to – the

Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985) (citations omitted) (emphasis added). In the case at bar, the sentencing jurors were needlessly prevented from viewing their task "as the serious one of determining whether a specific human being would die at the hands of the State" because of the admission of evidence which indicated that Petitioner would die at the hands of the state regardless of their decision in this case.

This Court ruled in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a jury's sense of responsibility for determining the appropriateness of the death sentence in a specific case was impermissibly undermined where the jury was informed that its decision would be reviewed automatically by an appellate court. The Court reasoned that telling the jury that its decision will be automatically reviewed by an appellate court creates "an intolerable danger" that the jurors may feel that "the responsibility for any **ultimate determination of death** will rest with others." *Id.* at 333 (emphasis added).

In the case at bar, the jurors were informed that the ultimate determination of whether Petitioner was to be executed had already been made by a previous jury. Thus, in the instant case, there is even a greater danger that the jurors' sense of responsibility for determining whether Petitioner should be put to death was undermined, because the jurors were informed that Petitioner was going to be executed regardless of their decision. That is, the jurors knew that the ultimate responsibility for Petitioner's execution rested with the previous jury.

In *Caldwell*, where the prosecutor's comments "urged the jurors to view themselves as taking only a preliminary step toward" the defendant's execution, 472 U.S. at 336, the jurors knew that the defendant would not be put to death unless they affirmatively determined that he should be executed. Although the jurors in *Caldwell* may have been urged to view their decision to impose the death penalty as only a "preliminary step" toward the defendant's execution, at least they knew it was a **necessary step** in the process, a step without which the defendant's life would not be taken. In the instant case, however, the jurors were led to believe that their decision to impose the death penalty was not even a preliminary step toward Petitioner's execution, because he was going to be executed regardless of their decision.

In *Caldwell*, this Court determined that one reason the prosecutor's comments concerning the automatic appellate review of death sentences rendered the jury's determination unreliable is because such comments may suggest to the jurors that any errors they make may be corrected on appeal, thus increasing the possibility that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts." 472 U.S. at 331. This possibility is even greater when evidence that the defendant is already sentenced to die is admitted during the sentencing hearing, because the temptation to "send a message" of extreme disapproval even though the jurors are not convinced that death is the appropriate punishment is not tempered by the realization that their decision may result in a person being put to death.

This Court also observed that "[i]n evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive." 472 U.S. at 332-33. As the Court recognized:

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion.[citations omitted]. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Id. at 333.[6] The intolerable danger that jurors may minimize the importance of their role is even greater when evidence that the defendant is already sentenced to die is admitted during the sentencing hearing, because such evidence allows the jurors to conclude that their decision is not important. The *Caldwell* Court found it easy to envision a case in which jurors reluctant to inflict the

---

[6] Similarly the Oklahoma Court of Criminal Appeals has often recognized that jurors may eagerly accept any invitation to avoid the difficult duty of passing sentence upon the life of the accused. *See, e.g., Johnson v. State*, 731 P.2d 993, 1005 (Okla. Crim. App. 1987).

death penalty, sitting on a jury equally divided on the punishment issue, might be persuaded to give in by an argument that appellate review would correct any mistake made by the jury. It is no further stretch of imagination to envision jurors reluctant to impose death being persuaded to give in because of the perception that if the defendant is to die at all, he will die because of what the other jury decided, not because of what this jury decides.

That jurors will take their sentencing responsibilities less seriously if they believe the defendant is going to be executed regardless of what they decide is common sense. As the United States Court of Appeals for the Fifth Circuit Court aptly noted, "[t]he decision of the Court in *Caldwell* reflects this reality, insight born more of experience than of empirical study or abstract exposition." *Sawyer v. Butler*, 881 F.2d 1273, 1282 (5th Cir. 1989), *aff'd sub nom. Sawyer v. Smith*, 497 U.S. 227 (1990).

With the exception of the Oklahoma Court of Criminal Appeals in the instant case, every state court of last resort to address the issue has concluded that admission of evidence of a prior death sentence impermissibly undermines the jury's sense of responsibility for determining whether the defendant should be put to death. In *West v. State*, 463 So. 2d 1048 (Miss. 1985), the jury, as in the case at bar, was given a Judgment and Sentence form during the sentencing stage of a capital case that indicated the defendant already had been sentenced to death in an unrelated case. Apparently recognizing the irrelevancy and prejudicial nature of that portion of the form, the trial judge tried to "scratch it out," but "it was nevertheless still readable upon close examination." 463 So. 2d at 1052. Thus, the Mississippi Supreme Court had to

determine whether admission of such evidence impermissibly undermined the jury's sense of responsibility.

That court observed that "[t]he role of juror in a capital murder trial brings with it an awesome responsibility. Fortunately, few of us are ever required to make the decision whether to end another human being's life; however, that is precisely the question confronting jurors following a guilty verdict in a capital case." *Id.* at 1053 (quoting *Wiley v. State*, 449 So. 2d 756, 762 (Miss.1984)). The court concluded that informing the jury that the defendant already had been sentenced to die impermissibly undermined the jurors' sense of responsibility:

> That portion dealing with sentence should have been excised in such a manner that the jury could not determine by examination that the appellant had been sentenced to death. The reason is that if the jury knows that the appellant is already under a sentence of death it would tend to relieve them of their separate responsibility to make that determination. . . . This jury should not have been given the **false hope** that their verdict was not the only and final determination of whether the death penalty would be imposed on West. **The burden on the jury should not be lessened by reference to the actions of courts of review or, in this case, courts of other jurisdictions.**

463 So. 2d at 1052-53 (emphasis added).

Similarly, when faced with this same issue, the Illinois Supreme Court held that "the jury's awareness of defendant's prior death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision." *People v. Davis*, 452 N.E.2d 525,

537 (Ill. 1983). In *Davis*, as in the Mississippi case and the case at bar, the jury was given a copy of the defendant's conviction in another case which indicated that the defendant had been previously sentenced to death. The Illinois Supreme Court reasoned that "[a]ssuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would," and concluded that "this error alone is sufficient to warrant reversal of defendant's death sentence." 452 N.E.2d at 537.

The Supreme Court of Illinois also recognized the potential of such evidence to improperly influence a capital jury's determination of whether death was the appropriate punishment for the defendant. The court found that "introduction of such evidence may well have improperly influenced the jury's decision," because "[i]n determining his eligibility for the death penalty, the jury was aware that another jury had previously resolved the identical issue adversely to defendant," and thus, "[i]f a juror was uncertain as to whether defendant was qualified for the death sentence, the knowledge that twelve other people determined he was could have swayed the juror's verdict in favor of death." 452 N.E.2d at 537.

Shortly after *Davis*, the Illinois Supreme Court was confronted with a similar issue in *People v. Hope*, 508 N.E.2d 202 (Ill. 1986). In *Hope*, an inquiry conducted by the trial judge during the sentencing hearing revealed that two or three jurors had seen or read news reports the day before which disclosed the fact that the defendant had previously been sentenced to death for an unrelated murder. The Illinois Supreme Court concluded that "[t]he possibility that the jury, even one member, may have

sentenced the defendant to death on the basis of an **irrelevant, highly prejudicial** and nonstatutory aggravating factor constitutes reversible error." 508 N.E.2d at 206 (emphasis added).

Although this Court has never squarely addressed the issue of whether evidence of a previous sentence of death undermines the reliability of a capital sentencer's decision, the rationale of its opinion in *Baldwin v. Alabama*, 472 U.S. 372 (1985), is instructive. In that case, the Court reviewed the constitutionality of the former Alabama death penalty scheme. Under that procedure, a jury that found the defendant guilty of any one of a number of specified crimes "with aggravation" was required to fix the punishment at death. Had that been the end of the process, the scheme plainly would have violated the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), because it failed to provide for presentation of mitigating evidence to the jury. The jury's "decision," however, was not dispositive. After the jury made its determination, the trial judge was required to hear evidence of aggravation and mitigation, to weigh those circumstances, and to sentence the defendant to death or life imprisonment without parole.

Petitioner Baldwin contended that the jury's "decision" to impose death was an impermissible factor for the trial judge to consider because the jury's mandatory "sentence" standing alone would be unconstitutional. This Court noted that such argument might have merit if the judge were legally bound to consider the jury's sentence as a recommendation and to accord some deference to that decision. However, because the jury's "sentence" need not be given any weight in the sentencing equation

and the judge imposed the sentence after independently considering the defendant's background and character and the circumstances of his crime, the sentencing procedure was not unconstitutional.

The majority based its determination that the jury's "decision" was not a component of the judge's decision on three factors. First, the Alabama Supreme Court had construed the statute as requiring the sentencing judge to make the decision without regard to the jury's "sentence". 472 U.S. at 383. Second, there was no indication in the record that the trial court considered the jury's "sentence" in his determination. *Id.* at 385-86. Third, the sentencing judge would not have thought he owed any deference to the jury's "sentence" for the reason that it was mandatory and did not reflect consideration of mitigating circumstances. *Id.* at 386.

The Court's decision in *Baldwin* rested on the premise that the trial judge would not be swayed by the jury's sentence because of his knowledge that the "sentence" was mandatory and that the jury had no opportunity to consider mitigating circumstances. The Court reserved determination of the constitutionality of "a death sentence imposed by a judge who did consider the jury's verdict under this death penalty scheme as a factor that weighed in favor of the imposition of the death penalty." *Id.* at 386 n. 8.

None of the factors that persuaded the Court to sustain Baldwin's sentence are present here. In fact, the reverse of each is true. First, the jury was not instructed to make its decision without regard to the previous jury's

sentence. Rather, the jury was instructed to base its decision on the evidence presented in open court, and was instructed that admitted exhibits are evidence. (J.A. 3, 13). The jury was further told that "[t]he importance and worth of the evidence is for you to decide." (J.A. 13). Thus, the jury was allowed to consider the previous sentence of death and to assign whatever weight to that evidence it chose.

Second, jury determinations, unlike judicial determinations, are made in the privacy of the deliberation room. Apart from the checkmarks next to the alleged aggravating factors found to exist beyond a reasonable doubt, no record is made that would reveal "the countless factors and circumstances" upon which the decision to impose death rested. *See Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring in judgment). Since the jurors were instructed to consider the evidence admitted during the course of the trial, (J.A. 3, 13), it must be assumed that they considered the evidence that the defendant previously had been sentenced to death. *See Yates v. Evatt*, ___ U.S. ___, 111 S. Ct. 1884, 1893 (1991) (that jurors follow the instructions they are given is a basic presumption of appellate practice); *see also Espinosa v. Florida*, 505 U.S. ___, 112 S. Ct. 2926 (1992).

Third, unlike the trial judge in *Baldwin*, who knew that the jury's death sentence was mandatory and therefore not entitled to any deference, the jurors in this case had no comparable legal knowledge that would prevent

them from being swayed by the previous jury's determination that death was the appropriate sentence.[7] They had no idea upon what evidence the other jury's decision was based, and certainly had no idea that the conviction and sentence were the result of an unfair trial. All they knew was that twelve other jurors had unanimously decided that Petitioner should be executed.

This Court in *Baldwin* thus recognized the potential for knowledge of a death sentence to exert great influence on a capital sentencer's decision. The Supreme Courts of Mississippi and Illinois squarely held that such knowledge does impermissibly undermine the capital sentencing jury's sense of responsibility and may improperly influence its determination of whether death is the appropriate punishment in the case. Analysis under *Caldwell* further demonstrates the specific defects that can arise in the deliberative process when jurors are led to believe that they do not bear full responsibility for the sentence they impose. Thus, admission of this evidence stands to pervert the jury's assessment as to whether death is the appropriate punishment.

---

[7] Juries do not have the benefit of vast knowledge of the law that judges have. This Court has recognized this important fact in cases involving the aggravating factor "heinous, atrocious, or cruel" and its equivalents. When a jury is given inadequate instructions to cure the vagueness, its decision is disregarded because the jury would have had no way of knowing the proper limitation to put on the circumstance. A trial judge's finding of this circumstance, however, can be upheld because judges are presumed to be aware of any limiting construction the state appellate courts have placed on the aggravating circumstance. *See Walton v. Arizona*, ___ U.S. ___, 110 S. Ct. 3047, 3057 (1990).

2. Admission of evidence of the preexisting death sentence created a danger that the jury did not consider mitigating evidence.

This Court's decisions have firmly established that a capital sentencer may not be precluded from considering and giving effect to any mitigating aspect of a defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989). The cause of the barrier to the jury's consideration of mitigating circumstances is of no importance; the result of preclusion of consideration of mitigating factors is the same whatever the cause: vacation of the death sentence is required. *See Lockett*, 438 U.S. 586 (1978) (plurality opinion) (barrier interposed by statute); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (same); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (barrier interposed by sentencing court's refusal to consider mitigating evidence); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (barrier interposed by evidentiary ruling); *Mills v. Maryland*, 486 U.S. 367 (1988) (barrier interposed by ambiguous jury instructions); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (barrier interposed by absence of instructions).

Indicating to the jury that, regardless of its verdict in this case, the defendant would be executed for the murder of Lloyd Thompson, created a substantial risk that the jury would not have given consideration to Romano's case for life. Some jurors may have believed the compelling mitigating evidence justified imposition of a life sentence; however, any jurors who accordingly would

have held out for a life sentence might have given in to those who wanted to impose the death penalty because of the belief that the Petitioner was doomed to die despite their contrary decision. If just one juror's decision to vote to impose the death penalty was based on the mistaken belief that he was powerless to spare the Petitioner's life, the sentence is unreliable.[8]

The requirement that the jury be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or circumstances of the crime is essential to ensure "reliability in the determination that death is the appropriate punishment in a specific case." *Penry*, 492 U.S. at ___, 109 S. Ct. at 2951 (quoting *Woodson*, 428 U.S., at 305). As in *Mills v. Maryland*, "[t]here is, of course, no extrinsic evidence of what the jury in this case actually thought." 486 U.S. at 381. But there is a substantial risk that jurors would have felt powerless to spare the Petitioner's life, even if they believed that a punishment less than death was appropriate for this crime, because of the false belief that he would be executed regardless of any decision they made to the contrary. That risk is unacceptable, especially considering "the ease with which that risk could have been

[8] Under Oklahoma law at the time this case was tried, if the jury was unable to agree on punishment in a capital case within a reasonable time, the judge was required to dismiss the jury and impose a sentence of life imprisonment. Okla. Stat. tit. 21, § 701.11 (1981). That is, even if eleven jurors wanted to impose death and only one wanted to impose life imprisonment, effect was given to the vote for life. The statute has been changed to give the judge the additional option of life without parole. Okla. Sess. Laws 1987, c. 96, § 3.

minimized." *Turner v. Murray*, 476 U.S. 28, 36 (1986) (footnote omitted).

3. Evidence of the preexisting death sentence was misleading.

The sentence of death itself was misleading. Justice O'Connor, writing for the majority in *Ramos*, upheld the constitutionality of a death sentence where the jury was instructed that the Governor has the power to commute a sentence of life without the possibility of parole. *California v. Ramos*, 463 U.S. 992 (1983). The Court found that the so-called "Briggs Instruction" not only was accurate information to aid the jury in selecting an appropriate sentence, but also that it served to correct a misconception that life without the possibility of parole means that the defendant could never be paroled under any circumstances. 463 U.S. at 1009.

In this case, admission of the Judgment and Sentence created a misconception analogous to that created by the misleading title of the sentencing option "life without the possibility of parole" in *Ramos*. Juries are not sufficiently familiar with the appellate process to know that appeals are not always processed in sequential order.[9] That is, the layperson would not know that appeals can leapfrog each other.[10] The jury, having heard that the Petitioner was

[9] It would, of course, be far less likely that a judge, knowledgeable in the law, would be misled by evidence of a non-final conviction and accompanying death sentence.

[10] The leapfrog possibility was realized in this case. Because the Thompson conviction was overturned on direct

already sentenced to death, would have reasonably assumed that he would be executed, if at all, for the Thompson murder.

Moreover, correction of this misconception by court instruction or by closing argument would have been constitutionally prohibited. The only way to dispel the misleading effect of the previous death sentence would be to explain to the jury that the death sentence was not final but was on appeal and what that means. Although the trial court, and indeed the document itself, stated that the conviction was not final and on appeal, it is unlikely that the jury understood those unadorned words. *Cf. Caldwell v. Mississippi*, 472 U.S. at 343 (O'Connor, J., concurring in part and concurring in the judgment) ("[l]aypersons cannot be expected to appreciate without explanation the limited nature of appellate review"). The jury's misperception of the impact of the prior death sentence thus went uncorrected unless the jurors understood the meaning of "not final" and "on appeal." In that event, they must have realized that their own decision would be subjected to appeal as well, and the identical infirmity that required a reversal in *Caldwell* is present. *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *see also California v. Ramos*, 463 U.S. 992, 1011 (1983) ("advising jurors that a death verdict is theoretically modifiable, and thus not 'final' may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and

---

appeal, the Sarfaty conviction is now ahead in the appellate process. It now appears that the petitioner will be executed based on the determination of this jury.

for the moral responsibility reposed in them as sentencers").

A further problem needlessly created by the admission of the Judgment and Sentence form in this May 1987 trial, was that it informed the jury that Petitioner had been scheduled to be executed on April 20, 1987. The Judgment and Sentence form contained the following language: "defendant having been asked by the Court whether he had legal cause to show why Judgment and Sentence should not be pronounced against him, in conformity with the verdict of the jury, **and the defendant giving no good reason why said Judgment and Sentence should not be pronounced, and none appearing to the Court. . . .** " The Judgment and Sentence form went on to say that defendant was sentenced to death, in conformity with the jury's verdict, and that he intended to appeal. (J.A. 5-7). Just as "[l]aypersons cannot be expected to appreciate without explanation the limited nature of appellate review," *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring in part and concurring in the judgment), jurors cannot be expected to understand the very limited reasons why a Judgment and Sentence should not be pronounced. The jurors knew only that the defendant gave **no good reason** and that no good reason appeared to the court.

The Judgment and Sentence also set a date for Petitioner's execution that the jurors knew had not been carried out because Petitioner had appealed. Thus, there is an intolerable danger that the jurors sentenced Petitioner to death, not because they believed that death was

the appropriate punishment in this case, but out of frustration that the previous jury's decision to execute Petitioner, regarding which neither Petitioner nor the court could give good reason why it should not be pronounced, had not been carried out due to Petitioner's appeal. Alternatively, the jury may have speculated that a sentence of death in Oklahoma does not really mean the defendant will be executed. At the time the jury considered the defendant's fate, no one had been executed in Oklahoma since 1966. If so, the jury may have sentenced the Petitioner to death, not because of a determination that death was the appropriate sentence for this crime, but because of a belief that the effect of sentencing a defendant to death in Oklahoma does not result in death but rather in life imprisonment without possibility of parole, which was not a sentencing option under Oklahoma law at the time.

4. Evidence of the preexisting death sentence was materially inaccurate.

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), as in this case, the state alleged as an aggravating circumstance that the defendant previously had been convicted of a felony involving the use or threat of violence to the person of another. The only evidence introduced to support that aggravating factor was evidence of a prior felony conviction from New York. The jury imposed the death sentence. After the capital conviction and sentence had been affirmed on direct appeal, the New York conviction was reversed. Johnson unsuccessfully sought post-conviction relief. The Mississippi Supreme Court held

that vacation of the New York conviction did not affect the validity of the sentence. This Court reversed, finding that reversal of the conviction deprived the state's sole piece of documentary evidence of any relevance to the sentencing determination and that prejudice was apparent.

In this case, as in *Johnson*, the aggravating circumstance of "prior violent felony" was supported by only one felony conviction, and that conviction was eventually overturned, thus depriving the sole documentary evidence of any evidentiary value. Also as in *Johnson*, the error went beyond the invalidation of an aggravating circumstance supported by otherwise admissible evidence: "the jury was allowed to consider evidence that was revealed to be materially inaccurate." 486 U.S. at 590. When the Oklahoma Court of Criminal Appeals reviewed the Thompson murder conviction, it found that the conviction was the result of an unfair trial caused by the failure of the trial court to sever the trials of the Petitioner and his co-defendant and accordingly reversed the conviction. *Romano v. State*, 827 P.2d 1335 (Okla. Crim. App. 1992). Since the Judgment and Sentence were vacated, the document itself was materially inaccurate.[11]

---

[11] The Court of Criminal Appeals held in this case that the Judgment and Sentence which had been vacated by that court no longer provided proper support for the aggravating circumstance "prior violent felony." 847 P.2d at 389.

When the petitioner was retried for the Thompson homicide, he was again convicted and again sentenced to death. This fact does not breathe new life into the invalidated death sentence. The sentence of death that the jury considered is null and void. They did not consider the new sentence of death. Moreover, the real question here is not whether the petitioner would have received the same result had his first trial in the Thompson

Clearly, Petitioner's four-month-old death sentence for murder was inherently far more prejudicial than Johnson's twenty-year-old conviction for second-degree assault with intent to commit first-degree rape. Emphasis on the fact was not required for tremendous prejudice to result. Moreover, this Court found that even in the absence of the express argument made in *Johnson*, "there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.' " *Johnson*, 486 U.S. at 586 (*quoting Gardner v. Florida*, 430 U.S. at 359 (plurality opinion)). In this case, there is likewise a possibility that the jury's belief that the Petitioner had been sentenced to die was the decisive factor in the choice between a life sentence and a sentence of death.

5. Admission of evidence which could not be explained or denied violated due process.

Reaffirming that the sentencing phase of a capital case must satisfy the requirements of the Due Process Clause, in *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion), this Court held that the petitioner was denied due process when the decision to sentence him to die was

---

case been a fair trial, but rather, whether the sentence in this case might have been different if the jury had not learned of the prior sentence or had known that it was a conviction and sentence resulting from an unfair trial. *Cf. United States v. Tucker*, 404 U.S. 443, 447-48 (1972) (consideration of prior convictions, obtained without assistance of counsel, was improper on question of sentence; fact that defendant might have been convicted even with the assistance of counsel was irrelevant).

based, at least in part, on confidential information that he had no opportunity to explain or deny. *Id.* at 362. Conversely, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court held that introduction at the penalty phase of expert psychiatric testimony regarding future dangerousness did not present such a problem because the adversarial process, i.e., cross-examination and contrary evidence, could uncover any unreliability. *Id.* at 898-901.

Although the evidence in this case was made known to the defendant and his attorney, unlike the confidential pre-sentence investigation report in *Gardner*, the Petitioner had no realistic means to explain or deny the evidence. The collective opinion of the Thompson jury was admitted without having the jurors present for cross-examination. A sentence of death, while guided by objective factors, is necessarily a "highly subjective" decision.[12] *Caldwell*, 472 U.S. at 340 n.7. The only way to "explain" why the jury might have decided death was the appropriate punishment for the Thompson murder would have been to cross-examine individually all twelve jurors who made that decision. "[C]ontrolling considerations of . . . public policy, [however,] dictate that jurors cannot be called . . . to testify to the motives and influences that led to their verdict." *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987) (internal quotation marks and citations omitted). "The capital sentencing decision requires the individual

---

[12] Petitioner does not suggest that evidence of prior convictions are likewise impossible to explain or deny. "[S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of particular elements that returning a conviction does." *Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring in judgment).

jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments are difficult to explain." *Id.* at 311.

The only way to "deny" that the sentence was a lawful one which could be relied upon would have been to call the judges on the Oklahoma Court of Criminal Appeals and question them about the validity of the conviction and sentence. While theoretically this might have been possible, it certainly was not realistically available.

Affording the defendant an opportunity to explain or deny evidence used against him in a capital sentencing determination is an elemental due process requirement. *See Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986); *id.* at 9 (Powell, J., concurring in judgment). It follows that admission of evidence that by its very nature cannot be explained or denied likewise violates due process. Because a preexisting sentence of death is such a factor, it should not be admitted, and a sentence of death based on such a factor therefore violates due process.

B. ADMISSION OF EVIDENCE THAT THE PETITIONER ALREADY HAD BEEN SENTENCED TO DEATH FOR ANOTHER CRIME NEEDLESSLY UNDERMINED THE JURY'S SENSE OF RESPONSIBILITY BECAUSE SUCH EVIDENCE WAS IRRELEVANT TO ANY VALID STATE PENOLOGICAL INTEREST.

In making the formidable determination of whether an individual defendant should live or die, a capital

sentencer must be allowed to consider all possible **relevant** information. *California v. Ramos*, 463 U.S. 992 (1983). The State has never contended that evidence of the preexisting death sentence was relevant. No such argument was presented at trial, on appeal, or in the State's response to the petition for writ of certiorari. Indeed, no such argument would be tenable under the rulings of this Court. Although the evidence was admitted to prove the aggravating factor "prior violent felony," the stipulation concerning the conviction would have been sufficient alone to satisfy that circumstance. Introduction of the Judgment and Sentence as well added nothing to the proof of this circumstance and needlessly undermined the jury's sense of responsibility.

Evidence concerning the circumstance of the crime or the nature and background of the defendant is generally considered to be relevant. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (consideration of the character and record of the individual offender and the circumstances of the particular offense is a constitutionally indispensable part of the *process* of inflicting the death penalty); *Barclay v. Florida*, 463 U.S. 939 (1983) (defendant's prior criminal record is highly relevant to his individual background and character); *Zant v. Stephens*, 462 U.S. 862 (1983) (same); *Sumner v. Shuman*, 483 U.S. 66, 80 (1987) (past convictions of other criminal offenses are relevant); *Lockett v. Ohio*, 438 U.S. 586 (1978) (the sentencer cannot be precluded from considering any aspect of a capital defendant's character, record, or any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death); *Eddings v.*

Oklahoma, 455 U.S. 104 (1982) (sentencer must be permitted to consider sixteen-year-old defendant's family history); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (evidence of defendant's adjustment to incarceration is relevant mitigating evidence that cannot be excluded).

Consideration of factors that are constitutionally impermissible, misleading, or totally irrelevant to the sentencing decision, however, violates due process. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578 (1988) (invalidated conviction is not relevant evidence); *Dawson v. Delaware*, 503 U.S. ___, 112 S. Ct. 1093 (1992) (abstract beliefs that are protected by the First Amendment and that have no nexus to the case are irrelevant); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (race, religion, political affiliation are not relevant considerations).

Although the Constitution does not prohibit consideration at the sentencing phase of information not relating directly to either statutory aggravating or statutory mitigating factors, the information must be relevant either to the character of the defendant or to the circumstances of the crime. *Barclay v. Florida*, 463 U.S. 939 (1983) (Stevens, J., concurring in the judgment). *See also Zant v. Stephens*, 462 U.S. 862, 878-79, 885-89 (1983). Evidence that a capital defendant already has been sentenced to death is relevant to neither concern. Obviously, the particular punishment assessed for the killing of Lloyd Thompson is irrelevant to the circumstances of the Sarfaty homicide.

Moreover, the sentence of death is equally irrelevant to the character of the defendant. This Court observed in *Sumner v. Shuman* that the "simple fact that a particular inmate is serving a sentence of life imprisonment without

the possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death." 483 U.S. at 80. The simple fact that a capital defendant has previously been sentenced to death does not contribute at all to the profile of that person for purposes of determining whether he should be sentenced to death. Although evidence of crimes committed after a murder could be relevant in determining whether a defendant poses a continuing threat to society, and evidence of a sentence meted out before another crime is committed could be relevant to show that the defendant did not "learn his lesson,"[13] evidence that a sentence of death was imposed for an unrelated crime has no conceivable relevance to the appropriate sentence for the first murder committed. Such evidence says absolutely nothing about the defendant's character or background, or the circumstances of the crime.

This total lack of relevance to the capital sentencing determination has been recognized by every state court that has considered the issue. In the case at bar, the Oklahoma Court of Criminal Appeals held that "evidence of the imposition of the death penalty by another jury is **not relevant in determining the appropriateness of the**

---

[13] Petitioner does not contest the legitimacy of Oklahoma's aggravating factors that "the defendant was previously convicted of a felony involving the use or threat of violence to the person" or that "the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony." Such factors serve to narrow the class of persons eligible for the death penalty and reasonably justify imposition of that sentence.

death sentence for the instant offense. . . . . " *Romano v. State*, 847 P.2d 368, 391 (Okla. Crim. App. 1993) (emphasis added). In *People v. Davis*, 452 N.E.2d 525 (Ill. 1983), the Supreme Court of Illinois held that the fact that "defendant received the death sentence for a prior murder **has absolutely no relevance** to the issue of whether he is eligible to receive that penalty for the instant offense." *Id.* at 537 (emphasis added). *See also People v. Hope*, 508 N.E.2d 202, 206 (Ill. 1986) ("The possibility that the jury, even one member, may have sentenced the defendant to death on the basis of an **irrelevant**, highly prejudicial and non-statutory aggravating factor [of a prior death sentence] constitutes reversible error.") (emphasis added). Thus, every state court to consider the issue has concluded that evidence of a prior death sentence serves no legitimate purpose whatsoever and is irrelevant to the capital sentencing determination.

This is the Court's first opportunity to decide whether evidence of a prior death sentence is relevant to the capital sentencing determination. The recent, thorough examination by this Court in *Dawson v. Delaware*, 503 U.S. ___, 112 S. Ct. 1093 (1992), of whether introduction of evidence in a capital sentencing proceeding concerning the defendant's membership in the Aryan Brotherhood, a white racist prison gang, was relevant to any issue being decided in the proceeding, provides a useful framework for analyzing this question. The *Dawson* Court considered and rejected every imaginable context in which the Aryan Brotherhood evidence might have been relevant. The evidence was not tied in any way to the murder of Dawson's victim (both the defendant and the victim were white); no element of racial hatred

was involved in the killing; the evidence did not prove that the Aryan Brotherhood had committed any unlawful or violent acts; the evidence did not support any of the aggravating circumstances; the evidence was not relevant character evidence; and the evidence was not relevant to rebut any mitigating evidence offered by Dawson. *Id.* at ___, 112 S. Ct. at 1098. In sum, as eight members of this Court agreed, this evidence had no relevance whatsoever, and further, that its admission created a substantial danger that the jury might punish the defendant for his abstract beliefs.

The evidence in this case that the Petitioner already had been sentenced to death was likewise totally irrelevant to the sentencing determination. The evidence concerning the preexisting sentence of death was not tied in any way to the unrelated, previously-committed murder of Sarfaty; the **sentence** did not prove that Petitioner had committed any unlawful or violent acts; it did not support any of the aggravating circumstances; and it said nothing whatsoever about the character of the Petitioner. Admission of the evidence created a substantial danger that the jury deferred to the other jury's determination rather than determining for itself the appropriateness of death in this instance.

Furthermore, evidence of a prior death sentence is not relevant in the way that victim impact evidence is. In *Payne v. Tennessee*, 501 U.S. ___, 111 S. Ct. 2597 (1991), this Court held that evidence concerning the effects of the murder on the victim's family was relevant both to the meaningful assessment of the defendant's moral culpability and blameworthiness, and for rebuttal of mitigating evidence presented by the defendant. Evidence of

what a different jury decided was appropriate punishment for a separate crime, however, is neither relevant to the specific harm caused by the defendant, nor for assessing meaningfully the defendant's moral culpability and blameworthiness, nor for rebutting mitigating evidence presented by the defendant. In sum, the evidence is not relevant to any constitutionally permissible factor.

This Court has made clear that the decision to impose the death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or **totally irrelevant to the sentencing process.**' " *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887 n. 24 (1983) (emphasis added)). Because the sentence of death in this case was predicated, at least in part, on totally irrelevant information, the death sentence is unreliable.[14]

C. THE OKLAHOMA COURT OF CRIMINAL APPEALS USED THE WRONG STANDARD TO DETERMINE THE IMPACT OF THE ADMISSION OF EVIDENCE THAT THE PETITIONER ALREADY HAD BEEN SENTENCED TO DEATH.

The Oklahoma Court of Criminal Appeals conceded that "[l]earning that the defendant had previously

---

[14] Even if this Court finds evidence of the preexisting death sentence relevant, the evidence was nevertheless "so unduly prejudicial that it render[ed] the trial fundamentally unfair," *Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597, 2608 (1991) and risked "a verdict impermissibly based on passion, not deliberation." *Id.* at ___, 111 S. Ct. at 2614 (Souter, J., concurring).

received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of their decision," yet decided that, "when the jury is properly instructed as to its role and responsibility in making such a determination we cannot, on appellate review, conclude that the jury in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise." *Romano v. State*, 847 P.2d 368, 390 (Okla. Crim. App. 1993). Thus, the Oklahoma Court of Criminal Appeals applied an inappropriate standard of review.

This Court has consistently held that the "qualitative difference" of death from other punishments requires "a correspondingly higher degree of scrutiny of the capital sentencing determination," *California v. Ramos*, 463 U.S. at 998-99; *see also Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Gardner v. Florida*, 430 U.S. 349, 358 (1977), and that there is a corresponding difference in "the need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). The Oklahoma Court of Criminal Appeals acknowledged this need for heightened scrutiny, but then paradoxically presumed the jury's determination to be correct: "Reviewing the sentencing determination in the present case under this heightened standard, but also with a presumption of correctness, we find no reason to question the jury's conclusion." This presumption that the jury's conclusion was correct is fundamentally at odds with the inquiry required. *See Sawyer v. Smith*, 497

U.S. 227, ___, 110 S. Ct. 2822, 2832 (1990) ("our concern in *Caldwell* was with the '**unacceptable risk**' that misleading remarks could affect the reliability of the sentence") (emphasis added).

The court should have used the test espoused by this Court in *Caldwell*, which requires the **state** to prove that the admission of defendant's prior death sentence had no effect on the sentencing decision. The standard applied by the Court of Criminal Appeals improperly placed on the **defendant** the virtually insurmountable burden of proving that the admission of his prior death sentence did, as a matter of fact, affect the jury's sentencing decision. This standard not only conflicts with the standard employed in *Caldwell*, but is also contrary to the standard applied by this Court in other cases in which the Court has examined the reliability requirement of the Eighth Amendment.

> This Court has held that
>
> > a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation **creates the risk** that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (emphasis added). "When the choice is between life and death, that **risk** is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* Thus, although this Court did not specify the degree of such risk which must exist in order for the death sentence determination to be rendered unreliable under the Eighth Amendment,

it clearly did not require the Petitioner to prove that the asserted Eighth Amendment error did, in fact, contribute to the sentencing decision.

Similarly, in *Gardner v. Florida*, 430 U.S. 349 (1977), this Court ruled that the reliability requirement of the Eighth Amendment prohibited a death sentence from being imposed if it might have been based in part on a confidential report that may have contained inaccurate or misleading information. As this Court has since noted concerning *Gardner*, "[b]ecause of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed." *California v. Ramos*, 463 U.S. 992, 1004 (1983). Thus, in *Gardner*, in order to establish a violation of the reliability requirement of the Eighth Amendment, this Court did not require the petitioner to prove that the confidential report did, as a matter of fact, contribute to the sentencing decision, but only that it had the **potential** to do so.

In *Johnson v. Mississippi*, this Court acknowledged that "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." 486 U.S. 578, 584 (1988) (citations omitted). This Court held that this principle was violated by the admission of evidence of a conviction which subsequently had been reversed because, even if the prosecutor had not expressly urged the jury to consider it, "there would be a **possibility** that the jury's

belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.' " 486 U.S. at 586 (citation omitted) (emphasis added). Thus, the petitioner was only required to show that there was a **possibility** that the reversed conviction impermissibly influenced the sentencing determination.

This Court has also ruled that a state law that prohibited a jury instruction on any lesser included offense in a capital case violated the reliability requirement of the Eighth Amendment because "the unavailability of the lesser included offense instruction enhance[d] the risk of an unwarranted conviction." *Beck v. Alabama*, 447 U.S. 625, 638 (1980). In *Beck*, the petitioner was only required to establish that the absence of the lesser-included instruction increased the risk of an unwarranted conviction, not that it actually did affect the verdict in that case.

The admission of the Judgment and Sentence form indicating that Petitioner was already under a sentence of death rendered the jury's sentencing determination unreliable under the Eighth Amendment, regardless of which standard from this Court's cases involving the Eighth Amendment reliability requirement is applied. That is, under the *Caldwell* standard, "it cannot be said" that the jury's awareness of the preexisting death sentence "had no effect on the sentencing decision"; under the language used in *Lockett* and *Beck*, the jury's knowledge of Petitioner's prior death sentence "enhanced the risk" of an unwarranted death sentence; under the *Gardner* test, the jury "potentially might have based its decision in part" on the fact that Petitioner was already under a sentence of death; and under the *Johnson* standard, there is a

possibility that jurors' belief that Petitioner was going to be executed regardless of their decision contributed to their choosing to sentence him to death. Thus, in holding that the admission of the evidence at issue was not constitutional error because the court could not conclusively determine that it in fact undermined the jury's sense of responsibility, the Oklahoma Court of Criminal Appeals applied an inappropriate standard.

The Oklahoma Court of Criminal Appeals further erred in its reliance on the jury instructions to prevent knowledge of the preexisting death sentence from diminishing their sense of responsibility. Without explaining how the instructions would have had such effect, the court merely noted that "[t]he jury was instructed that it had the responsibility for determining whether the death penalty should be imposed," and that "[i]t was never conveyed or intimated in any way by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized." 847 P.2d at 390. The instructions given in this case were comparable to the instructions given in *Caldwell*, and, of course, the *Caldwell* majority did not find that those instructions would have prevented the jury from believing that the responsibility for the death sentence rested elsewhere.

Furthermore, in *Caldwell* the information that led the sentencer to believe responsibility for the death sentence rested elsewhere came in the form of argument, and the jury was specifically instructed to find facts based upon the **evidence**. 472 U.S. at 352. In the instant case, the information that led the jurors to believe responsibility for the death sentence rested elsewhere came in the form

of **evidence**. The jury was affirmatively instructed to base its decision on the evidence, (J.A. 3, 13), and never instructed not to consider the evidence indicating that Petitioner was already under a death sentence. Unlike the situation in *Caldwell* where the jury was instructed not to utilize the misleading and inaccurate argument that was made, here the instructions actually exacerbated the prejudicial influence of the admission of the evidence that Petitioner was already sentenced to die. The curative instructions were insufficient to guard against the prejudicial influence of the information even in *Caldwell*. Here, not only were no curative instructions given, the instructions added to the error.

Petitioner submits that evidence which undermines the jury's sense of responsibility casts so much doubt on the reliability of the deliberation process that it can never be considered harmless. This Court may decide, however, that the harmless error rule, which is generally employed when constitutionally impermissible evidence is admitted in a capital sentencing hearing, can be applied. Even under that standard, it is clear that the death sentence should be vacated.

Under a harmless error analysis, the test is not whether the legally admitted evidence would support the death sentence, but rather, whether the state has proved beyond a reasonable doubt that the error complained of did not contribute to the jury's decision. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). Petitioner respectfully submits that the state has not, and indeed cannot, prove beyond a reasonable doubt that the admission of evidence that he already had been sentenced to death did not contribute to the jury's decision. Short of explicitly

telling the jury that its decision did not matter, admission of evidence of a preexisting death sentence would have a more pervasive influence on the jury's sense of responsibility than any other kind of evidence. An error does "not contribute to a verdict" only if it is unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. *Yates v. Evatt*, ___ U.S. ___, 111 S. Ct. 1884 (1991). The influence of evidence of a preexisting death sentence is pervasive. Because the State did not prove beyond a reasonable doubt that the evidence did not influence the sentencing jury, the judgment must be reversed.

CONCLUSION

Until the Oklahoma Court of Criminal Appeals' decision in this case, every court to consider the issue had determined that the admission of evidence that a capital defendant already had been sentenced to death was irrelevant and impermissibly undermined the jury's sense of responsibility. If the death sentence in this case is allowed to stand, there is a risk that Petitioner will be executed although no sentencer has made a reliable determination that death is appropriate in this case. That risk is unacceptable, especially considering "the ease with which that risk could have been minimized." *Turner v. Murray*, 476 U.S. 28, 36 (1986) (footnote omitted). The Oklahoma Court of Criminal Appeals' judgment should be reversed

insofar as it leaves undisturbed this unreliable sentence of death.

Respectfully submitted,

LEE ANN JONES PETERS*
ROBERT A. RAVITZ
JULIA SUMMERS
JAMES DENNIS

Office of the Public Defender
of Oklahoma County
320 Robert S. Kerr, Rm. 611
Oklahoma City, OK 73102
Telephone: (405) 278-1550

**Counsel for Petitioner*

(6)

No. 92-9093

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN JOSEPH ROMANO,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OF RESPONDENT

*A. DIANE BLALOCK
ASSISTANT ATTORNEY GENERAL

SANDRA D. HOWARD
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

2300 N. LINCOLN BLVD., RM 112
OKLAHOMA CITY, OKLAHOMA 73105-4894

COUNSEL FOR RESPONDENT

*Counsel of Record

66 pp

QUESTION PRESENTED

Does admission of evidence that a capital defendant has previously been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death sentence, in violation of the Eighth and Fourteenth Amendments?

INDEX

CASES CITED

STATUTES CITED

Case No. 92-9093

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

JOHN JOSEPH ROMANO,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

BRIEF OF RESPONDENT

Respondent, the State of Oklahoma, by and through Susan Brimer Loving, Attorney General of the State of Oklahoma, respectfully requests that this Court affirm the decision of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Criminal Appeals is recorded at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992) cert granted, in part Romano v. Oklahoma, ____ U.S. ____, 114 S.Ct. 380, 126 L.Ed.2d 330 (1993).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

John Joseph Romano, hereinafter referred to as the "defendant," is incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-87-397.

The defendant and his co-defendant, David Wayne Woodruff, were convicted of two separate murders in Oklahoma County, which occurred approximately nine (9) months apart.

The murder of Roger Sarfaty occurred sometime between October 10 and October 15, 1985. The murder of Lloyd Thompson occurred on July 19, 1986. The defendant and Woodruff were first tried and convicted for the Thompson murder. Subsequently, in May 1987, the defendant and Woodruff were tried and convicted for the Sarfaty murder. Both defendants received sentences of death in both murder cases.

The issues before this Court arise from the second trial, that dealing with the murder of Roger Sarfaty. Those issues, however, deal with the admissibility of the conviction and sentence from the Thompson murder which was introduced in the sentencing stage of the Sarfaty murder.

The defendant knew Roger Sarfaty, who was an independent jewelry dealer (Tr. III, 143, 174). After one business transaction with Sarfaty, the defendant told a friend of his, Tracy Greggs, that they should rob and kill Sarfaty, emphasizing that Sarfaty would have to be killed because he would be able to identify them (Tr. III, 175, 176).

On October 12, 1985, the defendant and Woodruff went to an Oklahoma City shopping mall. They went into a electronics store, where the defendant knew the manager. Both men were intoxicated and had glasses of beer with them (Tr. IV, 21). At one point the manager noticed a stain on the

defendant's pants which looked like blood. When she asked him about it, he stated that he had cut his hand while painting a house (Tr. IV, 22). Both the defendant and Woodruff pulled a large sum of quarters[1] from their pockets, telling the manager that they had plenty of money (Tr. IV, 23, 29).

The manager called security and the defendant and Woodruff were eventually picked up by Oklahoma City police officers and charged with public intoxication. At the relaxed check-in at the detox center where the men were taken, one officer noticed that the defendant was wearing an expensive looking heavy gold necklace (Tr. IV, 62). After the men were released from the detox center, Woodruff's girlfriend

[1]Acquaintances of Roger Sarfaty testified that he kept large quantities of quarters in his apartment, but none were found when his body was discovered. (Tr. III, 37, 69, 134).

took them back to the mall to get Woodruff's car. She noticed a number of diamond papers scattered on the ground next to the passenger's side of the car (Tr. IV, 77).

On October 15, 1985, Woodruff mailed a quantity of jewelry to a man in California (Tr. IV, 76, 122). On October 16, 1985, the defendant called Woodruff. Following the call Woodruff and his girlfriend drove by Sarfaty's apartment, where they saw police cars (Tr. IV, 87). Incriminating evidence was found in Woodruff's apartment when he was arrested (Tr. IV, 92). The defendant spontaneously remarked to some people at a pool hall that he could not have killed Sarfaty because he was

incarcerated[2] at the time of the murder (Tr. IV, 127).

Evidence presented during the second stage of trial revealed that, in addition to the Thompson conviction, the defendant had previously been convicted of two separate charges of obtaining money by bogus check, and second degree forgery (Tr. VI, 45).

The Thompson murder convictions were reversed on direct appeal, due to the improper joinder of the defendant's trial with that of the co-defendant, Woodruff. Romano v. State, 827 P.2d 1335 (Okla. Crim. App. 1992); Woodruff v. State, 825 P.2d 293 (Okla. Crim. App. 1992).

During the sentencing phase of the Sarfaty trial, the jury found that there

[2]Evidence established that the defendant was incarcerated at the Enid Community Treatment Center, but regularly received weekend passes (Tr. III, 165, 166).

was a probability that the defendant constituted a continuing threat to society, that he had previously been convicted of a felony involving violence, that the murder was committed to avoid arrest or lawful prosecution, and that the murder was especially heinous, atrocious, or cruel. Having found the existence of four (4) of the aggravating circumstances necessary under Okla.Stat.tit. 21, § 701.12 (1981) before a penalty of death can be imposed, the jury then assessed the death penalty. The trial court followed the recommendation of the jury.

The defendant filed a direct appeal from the Sarfaty conviction, which was affirmed by the Oklahoma Court of Criminal Appeals at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992). On direct appeal, the "prior violent felony conviction" aggravator was stricken because the

Thompson murder conviction[3] had been reversed on appeal, subsequent to the defendant's trial in this case.

However, the Court of Criminal Appeals found that evidence of the Thompson murder was properly considered in regard to the "continuing threat" aggravating circumstance, as the Thompson murder conviction was not reversed because of the sufficiency of the evidence, but because of improper joinder of the defendants. After reweighing the remaining aggravators against the mitigating evidence, the Court of Criminal Appeals upheld the sentence of death.

---

[3]While the defendant had other prior felony convictions, mentioned above, none involved the use or threat of violence, and thus could not be considered in support of this aggravating circumstance.

SUMMARY OF THE ARGUMENT

I.

Evidence of a prior death sentence does not violate the Eighth Amendment under the holding of Caldwell v. Mississippi, nor the Fourteenth Amendment's due process clause, because it does not inform the jury that the ultimate responsibility for the determination of the defendant's sentence lies elsewhere. Evidence of a defendant's prior murder conviction is certainly relevant evidence to which a sentencer is entitled in a capital case. And, arguably, the sentence the defendant received for that conviction is also relevant evidence for the sentencer.

II.

The Oklahoma Court of Criminal Appeals determined that it was error for the defendant's prior death sentence to be revealed on the Judgment and Sentence that was introduced in aggravation in the

defendant's murder trial. However, the Oklahoma Court applied a harmless error analysis and determined that the prior death sentence evidence could not have affected the jury's sentencing verdict in this case.

The Oklahoma Court's analysis was proper, and was in line with a number of other jurisdictions, who refuse to apply a per se reversible error rule to this type of evidence.

ARGUMENT

I.

ADMISSION IN THE SENTENCING STAGE THAT THE DEFENDANT HAD ALREADY RECEIVED A PRIOR DEATH SENTENCE DID NOT IMPERMISSIBLY UNDERMINE THE JURY'S SENSE OF RESPONSIBILITY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In order to satisfy federal constitutional standards, the death penalty must be applied in a consistent and rational manner. This Court has stated that the Eighth Amendment requires a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion).

A State may not limit a jury's consideration of mitigating circumstances presented by the defendant. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). A State must

sufficiently define aggravating circumstances to narrow the class of criminal defendants to which the death penalty applies. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). At the heart of Eighth Amendment jurisprudence is the requirement that those States that have the death penalty as an option must "adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence." Sawyer v. Whitley, 505 U.S. ____, 112 S.Ct. 2514, 120 L.Ed.2d 269, 281 (1992).

Oklahoma has adopted procedural safeguards against the improper imposition of the death penalty. While aggravating circumstances are limited to those specified under statute, there are no limitations imposed on mitigating evidence. Okla.Stat.tit. 21, § 701.10 (1981). The statutory aggravating circumstances have been narrowed to satisfy constitutional

safeguards. Okla.Stat.tit. 21, § 701.12 (1981). Capital trials are conducted in bifurcated proceedings, with all relevant evidence as to sentencing presented during the sentencing stage. The defendant must receive prior notice of the evidence which the State plans on presenting in aggravation, and the State is statutorily prohibited from presenting any evidence of which the defendant does not have notice. Okla.Stat.tit. 21, § 701.10 (1981). The defendant has the right to address and attempt to rebut the aggravating evidence. The defendant may present mitigating evidence. The jury is not limited in its consideration of mitigating evidence, but it is limited to consider only the aggravating circumstances alleged. The jury must find that the aggravating circumstance(s) outweigh the mitigating evidence before it may impose the death penalty. Okla.Stat.tit. 21, § 701.11

(1981). Even then, it is not required to impose the death penalty. The jury is instructed to give the defendant the benefit of the doubt in determining the aggravating circumstances.

The issue presented here is whether or not a Judgment and Sentence introduced during the sentencing stage of a capital proceeding, which reflected that the defendant had a prior death sentence, caused the jury to ignore all the sentencing stage evidence and instructions and impose the death penalty arbitrarily, merely because the defendant had already received one death sentence.

This Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" Medina v. California, 505

U.S. ____, 112 S.Ct. 2572, 120 L.Ed.2d 353, 362, (1992). In Medina, the Court affirmed that the Due Process Clause did not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Medina, ibid.

The defendant asks this Court to establish a per se rule holding that the introduction of evidence of a prior death sentence in a capital proceeding violates the defendant's Eighth and Fourteenth Amendment rights, and ipso facto requires a reversal of the proceedings.

The respondent asks this Court to find that the introduction of the prior death sentence in this case did not undermine the jury's sense of responsibility in imposing the death penalty, and to refuse to apply a per se rule prohibiting this type of evidence. As the authority below will show, other States have applied harmless error analysis to this evidence, have ruled

the evidence not to be error at all, and have even found that the defendant had legitimate reasons to seek introduction of the evidence.

A. The Evidence of a Prior Death Sentence Does Not Automatically Violate the Holding of Caldwell v. Mississippi.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) this Court found that the defendant's Eighth Amendment rights had been violated by a prosecutor's comments, endorsed by the trial judge, that the jury's verdict was "not the final decision," and that their decision was "automatically reviewable." Caldwell, 472 U.S. at 325 - 326. This Court found that the prosecutor's remarks improperly led the jury to believe "that the responsibility of the defendant's death rests elsewhere," Caldwell, 472 U.S. at 329, and characterized the remarks as "state-induced suggestions that the sentencing jury may shift its sense of

responsibility to an appellate court." Caldwell, 472 U.S. at 330.

In this case the jury was not told in argument, nor led to believe by the instructions of the court, that the responsibility for sentencing rested anywhere other than on its collective shoulders. As a portion of the evidence introduced in aggravation, the State submitted a certified copy of a Judgment and Sentence which reflected that the defendant had previously been convicted of the crime of First Degree Murder in the Thompson case. The defendant stipulated to the fact of the Thompson conviction, but objected to the Judgment and Sentence because it revealed that the defendant had received a sentence of death for the Thompson murder (Tr. VI, 44, 46 - 47). On the face of the Judgment and Sentence it was also reflected that the defendant had given notice of his intention to appeal

(J.A. 4 - 5). In telling the jury about the stipulations jury the trial court emphasized to them that the Thompson murder conviction was not final, and was on appeal (Tr. VI, 46).

The defendant asserts that his jury was led to believe that his death had already been decided, and that therefore the jurors were allowed to conclude that their sentencing decision was not important. Brief for the Petitioner, p. 16. This argument must fail on two counts. First, it assumes that the jury read and paid particular attention to that portion of the Judgment and Sentence which stated that the defendant had received the death penalty, but ignored the portion that stated he had given notice that he was going to appeal that conviction; and Second, it speculates that the jury relied on that piece of evidence to the exclusion of all the other evidence in the sentencing stage in

contravention to its instructions and determined that since the defendant already had one death sentence, he should therefore automatically receive another.

The face of the Judgment and Sentence revealed that it was not a final conviction; it stated that the defendant had given notice of his right to appeal. The trial court emphasized that the conviction was not final in his remarks to the jury (Tr. VI, 46, 47). The jury knew that the defendant's prior death sentence was subject to appellate review, and therefore might subsequently be overturned. In Caldwell the reference to appellate review was held sufficiently serious to undermine the confidence of the verdict. Here the defendant, on the one hand asks this Court to expand Caldwell to establish a per se rule against evidence of a prior death sentence, but ignores the effect of Caldwell on the evidence of the prior death

sentence. The jury was never informed that their decision in this case was subject to appellate review, their awesome sense of responsibility in assessing the death penalty was thus not undermined. The jury was informed, however, that the verdict in the prior case was to be subjected to appellate review, thus diminishing the finality and importance of that document under the holding of Caldwell.

The offending evidence in this case is not of the type addressed in Caldwell. The prosecutor here did not seek to diminish the jurors' sense of responsibility in making their sentencing decision. The trial court certainly did not do so, and in fact, the court's instructions emphasized that it was the jury's responsibility to reach a verdict as to sentence (J.A. 7, 8, 10, 12). The defendant must presume, in making his arguments, that the offending portion of the Judgment and Sentence was

the reason for the jury's sentence of death. Such a presumption must fail. It assumes that the jury ignored the judge's instructions that the jury was the determiner of the sentence (J.A. 12). It assumes that the jury ignored the fact that the prior Judgment and Sentence was on appeal, despite the trial court's instructions. And, it assumes that the jury determined that the prior sentence of death automatically required a present sentence of death. It is just as logical to assume, in a close case, where the jury is struggling with the decision to impose life or death, that the knowledge that the defendant already is facing one sentence of death may persuade them to assess life. Evidence that the defendant already has one death sentence may persuade the jury to feel sorry for him, and assess the lesser punishment.

It may well work to the defendant's advantage to have the jury informed about a prior death sentence. For example, in People v. Whitt, 798 P.2d 849, 859 - 860 (Cal. 1990) cert denied ____ U.S. ____, 112 S.Ct. 2816, 115 L.Ed.2d 988 (1991) and People v. Anderson, 801 P.2d 1107 (Cal. 1990) cert denied ____ U.S. ____, 112 S.Ct. 148, 116 L.Ed.2d 113 (1991) the California appellate court found that the defendants there had tactical reasons for declining to object to the court's disclosures about the defendants' death sentences. Both of the defendants in those cases argued that they had experienced "Death Row redemptions" in mitigation, claiming that they had changed their lives since their incarceration. The California cases indicate that there are valid reasons why a capital defendant might want evidence that he had previously received a death sentence placed before the jury.

In a federal habeas case, the defendant claimed that evidence that he had a prior death sentence, which had been vacated, diminished the jury's sense of responsibility and was impermissible under Caldwell. The Fourth Circuit concluded that the evidence, even when taken together with the trial court's continual references to the jury's sentencing "recommendation," had no effect on the verdict. Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990) cert denied ____ U.S. ____, 112 L.Ed.2d 18, 115 L.Ed.2d 1102 (1991). The Circuit distinguished the Caldwell cases cited by the defendant, thus:

> Moreover, in each case Gaskins cites finding a Caldwell violation, the suggestion to the jury that its decision was merely advisory was explicit and obvious. Nowhere in this case did anyone even imply that the jury's recommendation was non-binding.

Gaskins v. McKellar, 916 F.2d at 953. Likewise, in this case, no one implied that the jury's sentence would be non-binding.

The cases cited below all involve jurors' knowledge of a defendant's prior death sentence at the time they are seated for jury duty. In these situations the jurors knew of the prior death sentence even before they rendered their verdict in the guilt/innocence stage of the proceedings. The Respondent respectfully submits that these cases are instructive, and on point. It is much more logical to assume that knowledge that a defendant had previously committed murder and been sentenced to death would affect the first stage guilt verdict than that it would affect the second stage sentencing verdict.

In State v. Bell, 393 S.E.2d 364 (S.C. 1990) cert. denied Bell v. South Carolina, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) the defendant claimed that the

jurors' knowledge of his prior death sentence violated the holding in Caldwell and diminished their sense of responsibility in determining his sentence. The jurors knew of the defendant's prior death sentence before the first stage guilt determination. However, during voir dire, each of those jurors stated that they could set aside any previous impression or opinion and render a verdict based on the evidence presented in the courtroom. The South Carolina court stated:

> [W]e also reject Bell's argument that the jurors' knowledge of the previous death sentemce diminished their sense of responsibility in deciding what sentence to impose. . . We find that the reasoning of Caldwell does not control the case at bar. The jurors here disavowed themselves prior to their qualification of any bias or prejudice against the appellant, specifically with respect to his previous sentence of death.

Bell, 393 S.E.2d at 368. And, in State v. Atkins, 399 S.E.2d 760 (1990) cert denied ___ U.S. ____, 111 S.Ct. 2913, 115 L.Ed.2d 1076 (1991) the defendant contended that two jurors who had read in the newspaper that the defendant had a prior death sentence should have been removed for cause. The South Carolina Court disagreed, and after finding that both jurors stated they would be guided by the law, the evidence, and no other consideration, found that the jurors were qualified to sit.

In another voir dire knowledge case, Turner v. Commonwealth, 364 S.E.2d 483 (Va. 1988) cert denied 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988) a prospective juror indicated that his knowledge that the defendant had previously received a death sentence, although vacated, might affect his decision. After reviewing the entirety of the prospective juror's answers, the Virginia Court found

that the trial court's refusal to strike the juror for cause was not error.

In the dissent in Caldwell, Justice Rehnquist wrote:

> [I]n general the Eighth Amendment is satisfied where the procedures ensure that the sentencer's discretion is 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'

Caldwell, 472 U.S. at 348. Justice Rehnquist also recognized that the Court's prior cases taught "that a death sentence need not be vacated in every case where the procedures by which it is imposed are in some way flawed." Caldwell, ibid.

While the Oklahoma Court held that the prior death sentence evidence was improperly disclosed to the defendant's jury in the sentencing stage, it also found that the evidence could not have affected the jury's sentencing determination. The Court of Criminal Appeals found that the

admission of the evidence did not violate the defendant's due process rights.

In Darden v. Wainwright, 477 U.S. 168, 184 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) this Court noted that Caldwell was only relevant to certain types of comments which mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. No such comments or instructions are present here. The jury was not mislead as to its role in the sentencing process. Evidence of the Thompson death sentence did not constitute a Caldwell violation in the Sarfaty sentencing proceeding.

B. Evidence of a Defendant's Prior Murder Conviction is Relevant Evidence to which the Sentencing Jury is Entitled.

The sentencer in a capital case is entitled to all relevant information in order to make the best informed and reasoned decision possible as to what

sentence to apply to that individual defendant. "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 275, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

A defendant's prior criminal record and/or activity has long been approved by the state courts and this Court as relevant information to which the sentencing jury is entitled. Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); Van Woundenberg v. State, 720 P.2d 328, 336 - 337 (Okla. Crim. App. 1986). The defendant acknowledges this precedent, but asserts that the sentence imposed for a prior crime has no relevance in the sentencing determination.

The Oklahoma Court of Criminal Appeals held that the evidence of the death

sentence rendered in the Thompson case should not have been admitted in this case. However, the Respondent does not concede that holding was necessarily required. In Commonwealth v. Beasley, 479 A.2d 460 (Pa. 1984) the defendant claimed that it was error for the State to introduce, during the sentencing stage of a capital case, evidence that the defendant had previously been convicted of killing a police officer and had received a sentence of death for that crime. The Pennsylvania Court held that the sentence received for the prior crime was relevant evidence to which the jury was entitled:

> The nature of an offense, as ascertained through examination of the circumstances concomitant to its commission, has much bearing upon the character of a defendant, and, indeed, without reference to those facts and circumstances, consideration of "convictions" would be a hollow process, yielding far less information about a

> defendant's character than is relevant.
>
> Convictions are defined by the essential and necessary facts upon which they are based, and **judgments of sentences flow naturally from, and form an integral part of, those convictions**.

Beasley, 479 A.2d at 465 (emphasis added). The Pennsylvania Court held that there was no error in the admission of the prior sentence, and specifically rejected in a footnote the defendant's contention "that the jury regarded his life as not being truly in its hands," as "unfounded speculation." Beasley, ibid, n. 5.

In Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) rev'd in part Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) this Court struck down a Nevada statute which mandated a sentence of death for any inmate convicted of murder while that inmate was serving a sentence of life imprisonment

without the possibility of parole. This Court acknowledged that the mandatory death sentence impermissibly interfered with the jury's ability to consider the defendant's mitigating evidence. The Court stated:

> This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime.

Sumner v. Shuman, 483 U.S. at 79. Because that level of culpability varies according to each crime, informing the jury of the sentence imposed gives that body more information about the prior crime. As the Pennsylvania Court acknowledged, the sentence is an integral part of the crime, and serves to offer insight into that crime.

In its Bill of Particulars filed against the defendant in the Sarfaty case, the State alleged four aggravating circumstances. Two of those were: that

there was a probability that the defendant would pose a continuing threat to society, and that the defendant had a prior felony conviction. The State used the evidence of the Thompson murder to prove both aggravators. Because the Thompson case was subsequently reversed due to improper joinder, the Court of Criminal Appeals struck the prior violent felony conviction aggravator, but held that evidence of the Thompson murder was still relevant evidence and properly considered as evidence of "continuing threat."

Of course, it is well settled that a crime need not be adjudicated to be considered as evidence in support of the "continuing threat" aggravating circumstance. Jurek v. Texas, supra; Johnson v. State, 665 P.2d 827 (Okla. Crim. App. 1983). The Thompson conviction was not vacated because of insufficiency of the evidence, but because of improper joinder.

It was still relevant evidence to consider in support of this aggravating circumstance.

The Court of Criminal Appeals considered this issue, and found that "the fact that Appellant's conviction for [the Thompson] murder was not final does not affect the admissibility of evidence of this offense," for the purpose of proving the continuing threat aggravator. The Court then held:

> Our decision is not altered by the fact that Appellant's conviction for the Thompson homicide has been reversed and remanded for a new trial. (Citation omitted). As the case was not reversed on the basis of insufficient evidence of guilt, the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence.

Romano, 847 P.2d at 389. The Court then, in its reweighing analysis, found that the evidence was sufficient to support the

continuing threat aggravator. Romano, 847 P.2d at 394.

The Judgment and Sentence from the Thompson case was relevant evidence for the jury to consider. The Court of Criminal Appeals ruled that the death sentence should not have been disclosed to the jury, but the Respondent submits that holding is not necessarily constitutionally required. As the Pennsylvania Court above noted, evidence of the sentence is an integral part of the conviction. Evidence of the sentence imposed gives the sentencing jury more relevant information about the severity of the defendant's prior crime. Thus, the State submits the Court of Criminal Appeals could have properly held that the sentence rendered in the Thompson case was relevant evidence to which the jury was entitled. Since the jury was never instructed or admonished that it was not the final decision maker as to the

defendant's sentence in the Sarfaty case, evidence of the Thompson murder did not serve to undermine the reliability of the Sarfaty verdict.

Nothing in the evidence of the Thompson conviction and sentence could have led the defendant's jury to ignore the mitigating evidence which was presented. The defendant called eleven (11) witnesses to the stand during the second stage, including himself. The instructions fully advised the jury on the importance of mitigating evidence (J.A. 9). The defendant was not hindered in his presentation of, nor the jury's consideration of, the evidence in mitigation.

Nor was evidence of the Thompson conviction and sentence "materially inaccurate." The case of Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), cited by the

defendant, is inapplicable here. In Johnson v. Mississippi the prior murder evidence was not introduced to show any aggravating circumstance other than the defendant had a prior felony conviction. Evidence of the Thompson murder was used by the State to support two different aggravating circumstances. The Judgment and Sentence, though later reversed, was still relevant evidence to prove the "continuing threat" aggravating circumstance. The Court of Criminal Appeals did strike the "prior violent felony conviction" aggravator as a result of the Thompson reversal. In addition to the Judgment and Sentence in the Thompson case, the State also presented witnesses during the sentencing stage who testified as to the defendant's involvement in the Thompson murder. Therefore, any infirmity with the Judgment and Sentence caused by its later reversal was harmless error as

applied to the "continuing threat" aggravating circumstance.

II.

THE OKLAHOMA COURT'S HARMLESS ERROR ANALYSIS IN THIS CASE WAS CONSTITUTIONALLY PROPER, IN ACCORD WITH OTHER JURISDICTIONS, AND WAS CORRECT UNDER THE FACTS OF THIS CASE.

The Oklahoma Court of Criminal Appeals found that "evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense," but then found that in this case, the admission of evidence of the prior death sentence "did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process." Romano, 847 P.2d at 391.

The Court specifically found that evidence of the Thompson death sentence, while erroneously admitted did not constitute a violation under Caldwell.

In deciding the issue on direct appeal, the Oklahoma Court of Criminal Appeals acknowledged this Court's holding in Caldwell and specifically found that the defendant's jury was not misled to believe that the responsibility for a determination of the appropriate sentence rested elsewhere. Romano, 847 P.2d at 390.

Acknowledging that it was possible that learning of a prior death sentence could diminish the jury's sense of its role, the Court of Criminal Appeals focused on the instructions given to the jury in this case.

> The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. They were informed of their role as factfinders, that the weight and value of testimony and evidence was for them to determine, that they should not surrender their own judgment to that of any witness or item of evidence, and of their duty to follow the law in reaching their conclusion. It was never

> conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence.

Romano, 847 P.2d at 391. The Court did not abandon the issue there, however, but continued its analysis using that "greater degree of scrutiny of the capital sentencing determination" specified by this Court in California v. Ramos, 463 U.S. 992, 998, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Under that "heightened standard" the Court again considered the fact of the mention of the Thompson death sentence in the sentencing stage here, and found:

> **While evidence of the imposition of the death**

> **penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense, the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process.**

Romano, 847 P.2d at 391 (emphasis added). It is difficult to understand how the Court's analysis, above, does not meet with the constitutional standards set forth by this Court. Compare the above standard to the statement in Caldwell that the prosecutor's statements, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." Caldwell, 86 L.Ed.2d at 246.

The Court of Criminal Appeals did not exceed its jurisdiction in finding the evidence harmless, nor in considering the effect of the evidence in the context of

the sentencing proceedings. The Oklahoma Court's analysis of the impact of the evidence in the second stage here is akin to the Court's ability to reweigh the aggravating and mitigating evidence after one aggravator has been stricken (which was also done in this case). This Court has approved that practice, stating that "appellate sentencing, if properly conducted, would not violate due process of law." Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 1447, 108 L.Ed.2d 725 (1990).

In Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) it was stated:

> Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in Clemons v.

> Mississippi, 494 U.S. ____ (1990), **a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.**

Walton, 111 L.Ed.2d at 528 (Emphasis Added). Under the holding of Walton, the state appellate court may not only reweigh any remaining aggravating circumstances, but can even, in the first instance, apply constitutionally proper narrowing factors to an overbroad aggravating circumstance in determining whether or not the evidence supported that aggravator. The Court of Criminal Appeals acted well within its discretion in its treatment of the prior death sentence.

Even if this Court disagrees with the Oklahoma Court and finds that the introduction of the evidence in this case

was a Caldwell violation, harmless error analysis is still allowed. Caldwell does not demand a per se rule requiring reversal. The defendant urged the Tenth Circuit to accept that position in Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) cert denied 497 U.S. 1010, 110 S.Ct. 3256, 111 L.Ed.2d 765 (1990). In that case the prosecution made statements which arguably violated the rule in Caldwell. The petitioner urged the Court to adopt a "no effect" standard, i.e. the reviewing Court must find that the violation had "no effect on the sentencing decision," in order to affirm the decision. Hopkinson acknowledged that this "no effect" standard was, for all practical purposes, a per se rule requiring reversal any time a violation of Caldwell is found. After an exhaustive discussion of this Court's standards of review on constitutional challenges, and the

treatment of the issue by other Circuits, the Tenth Circuit adopted a "substantial possibility" test. Thus,

> [I]f a violation exists, . . . whether there is a substantial possibility that the prosecutor's statements, taken in context, affected the sentencing decision.

Hopkinson v. Shillinger, 888 F.2d at 1295.

The Oklahoma Court of Criminal Appeals applied an even higher standard in its harmless error analysis in this case. The Court found that "it is **highly unlikely** that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence," and "the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process." Romano, 847 P.2d at 390, 391.

This Court has recognized that "not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment." Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Oklahoma is not alone in its determination that this type of error may be harmless. Despite the defendant's contentions to the contrary, many States that have considered the issue refuse to apply a per se reversible error rule to this type evidence.

Even Illinois, which is cited by the Petitioner extensively in his brief as one of the States which has addressed the issue, refuses to apply a per se reversible error rule. While Illinois does hold that it is error for a jury to be informed that a capital defendant has previously been

sentenced to death[4], that State has also held that an inadvertent reference to a defendant's prior death sentence did not constitute reversible error. People v. Brisbon, 544 N.E.2d 297, 304 (Ill. 1989) cert denied 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 797 (1990). Florida has also applied this harmless error analysis. For example, in Sireci v. State, 587 So.2d 450 (Fla. 1991) cert denied ____ U.S. ____, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992) it was held that the prosecutor's reference to the prior death sentence did not prejudice the defendant or play a significant role in the resentencing proceeding, so as to warrant a mistrial.[5]

---

[4]People v. St. Pierre, 588 N.E.2d 1159 (Ill. 1992) cert denied ____ U.S. ____, 113 S.Ct. 381, 121 L.Ed.2d 297 (1992).

[5]See also State v. Williams, 657 S.W.2d 405, 414 (Tenn. 1983) cert denied 465 U.s. 1073, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984) in which it was held there was no prosecutorial misconduct in the State's reference to the defendant's prior death sentence, where the defendant had stipulated to his prior convictions and sentences.

In a federal habeas corpus proceeding, the petitioner claimed that he had been denied a fair state trial due to pretrial publicity. He maintained that area newspapers carried front page stories that disclosed that he had previously received a death sentence in another case. The Fourth Circuit denied relief, finding that the reports proceeded the defendant's sentencing by more than a year, and were reported in a straightforward manner. That Court stated:

> Although the prejudicial information that Willie had cited was publicized in Washington Parish, we do not find that these disclosures were so inherently prejudicial that a jury formed from the parish's inhabitants could be presumed to be biased.

Willie v. Maggio, 737 F.2d 1372, 1387 (4th Cir. 1984) cert denied 469 U.S. 1002, 105 S.Ct. 415, 83 L.Ed.2d 342 (1989).

In State v. Bradley, 538 N.E.2d 373 (Ohio 1989) cert denied 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990) the defendant claimed that his counsel was ineffective for not objecting to the admission of a police report, which contained, among other things, a reference to the defendant's prior death sentence. The Ohio Court found:

> We do not believe that this rises to the necessary level of prejudice. To hold otherwise would be to conclude that it is reasonably probable that after hearing evidence that appellant committed the murder and that he had previously been convicted of a murder and was confined in a penal facility when the latest incident occurred, the jury found appellant guilty and recommended the death sentence solely because the police report indicated that appellant had previously been sentenced to death. We do

> not find this conclusion justified.

Bradley, 538 N.E.2d at 382 - 383. Similarly here, it is not reasonable to assume that the jury, having found the defendant guilty of the present murder, and having been informed that he had previously been convicted of another murder, sentenced him to death solely because of the prior death sentence.

In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) the defendant claimed that one of the jury instructions prevented consideration of his mitigating evidence. In defining the standard of review, this Court stated:

> [T]he proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been

> impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.

Boyde, 494 U.S. at 380. The Court also noted that in order to prove other constitutional violations, the defendant must establish a reasonable likelihood that the trial result would have been different. Boyde, ibid, n. 4.

This Court has applied the harmless error rule to: coerced confessions - Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, 318 (1991); the admission of evidence obtained in violation of the Sixth Amendment right to counsel - Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); constitutionally overbroad jury instructions in a capital sentencing proceedings - Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725

(1990); and a host of other constitutional errors. See Arizona v. Fulminante, 113 L.Ed.2d at 329.

As explained in Fulminante, the "common thread" connecting the harmless error cases is that each involved "trial error," which this Court defined as:

> [E]rror which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Arizona v. Fulminante, 113 L.Ed.2d at 330. The error here is that type addressed in Fulminante -it is an error in the trial process and not an error infecting the entire framework of the proceedings. Arizona v. Fulminante, 113 L.Ed.2d at 331.

The Respondent urges this Court to accept the Oklahoma Court's assessment of the damage of the Thompson death sentence evidence in light of the other evidence

which was presented during the Sarfaty sentencing stage. However, this Court may also review the record de novo in order to determine harmlessness. Satterwhite v. Texas, 486 U.S. at 258.

The defendant in this case offered a list of seventeen (17) separate items of mitigation which the trial court accepted and submitted to the jury (J.A. 9). After the Court of Criminal Appeals invalidated the prior violent felony conviction aggravator, there remain three (3) valid aggravating circumstances. Evidence established that the murder of Roger Sarfaty was especially heinous, atrocious or cruel in that the victim's death was preceded by torture or serious physical abuse. Medical evidence showed that Mr. Sarfaty had struggled for his life. He had been forcefully restrained with his wrists and ankles bound. He was struck in the head approximately five time with a long

blunt object, and ultimately died of strangulation, which occurred after three to five minutes of slow suffocation. Romano, 847 P.2d at 386 - 387. The circumstantial evidence also established that the defendant knew Sarfaty and determined to kill him to prevent being identified as Sarfaty's robber. Romano, 847 P.2d at 387. This evidence supports the jury's finding that the murder was committed to avoid arrest or prosecution. The "continuing threat" aggravating circumstance was supported by the evidence that the defendant had previously murdered another man, Lloyd Thompson and the defendant's other felony convictions. Romano, ibid.

When the sentencing stage evidence is considered in conjunction with the jury instructions, it becomes apparent that evidence of the Thompson death sentence

evidence could not have affected the jury's verdict in the Sarfaty case.

Far more convincing to the jury than the bare Judgment and Sentence which was introduced here were the facts of the Thompson murder which were testified to by different witnesses. The underlying facts of the Thompson murder were important to establish the continuing threat aggravating circumstance.[6] It is illogical to assume that the jury placed more weight on the court document than they did the live testimony of the witnesses.

---

[6]In Oklahoma, a defendant may stipulate to his prior violent felony convictions when the State alleges that aggravator, so that the State is prohibited from going into the facts of the conviction to establish the requisite violent act. Brewer v. State, 650 P.2d 54, 61 - 63 (Okla. Crim. App. 1982) However, a defendant may not so stipulate when the conviction is alleged to prove the continuing threat aggravator because the underlying facts of the crime are what is important in establishing that aggravator. Smith v. State, 819 P.2d 270, 277 (Okla. Crim. App. 1991).

The Oklahoma Court's analysis of the issue was proper, and this Court should also find that any error in the admission of the evidence was harmless.

CONCLUSION

This Court should affirm the decision of the Court of Criminal Appeals.

Respectfully submitted,

SUSAN BRIMER LOVING
ATTORNEY GENERAL OF OKLAHOMA

A. DIANE BLALOCK*
ASSISTANT ATTORNEY GENERAL

SANDRA D. HOWARD
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL DIVISION

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921
ATTORNEYS FOR RESPONDENTS

*Counsel of Record

No. 92-9093

In The

Supreme Court of the United States

October Term, 1993

JOHN JOSEPH ROMANO,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The
Court Of Criminal Appeals Of Oklahoma

REPLY BRIEF FOR PETITIONER

LEE ANN JONES PETERS*
ROBERT A. RAVITZ
JULIA SUMMERS
JAMES DENNIS

Office of the Public Defender
of Oklahoma County
320 Robert S. Kerr, Rm 611
Oklahoma City, OK 73102
Telephone: (405) 278-1550

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

ARGUMENT IN REPLY

The following potentially misleading statements of law and fact in the briefs of respondent and its *amici* require reply.

> 1. *"Oklahoma is not alone in its determination that this type of error may be harmless. Despite the defendant's contentions to the contrary, many States that have considered the issue refuse to apply a per se reversible error rule to this type of evidence."* **Brief of Respondent at 48.** *"As the authority below will show, other States have applied harmless error analysis to this evidence, have ruled the evidence not to be error at all, and have even found that the defendant had legitimate reasons to seek introductions of the evidence."* **Brief of Respondent at 17.**

These assertions apparently are based on a misreading of the question presented in this case, as most of the cited cases do not concern admission of evidence that the defendant has already been sentenced to death in an unrelated case. A number of the lower court cases cited by the State concern the resentencing of a capital defendant after his death sentence had been vacated rather than a death sentence in another case.[1] Many of the cases

---

[1] *Willie v. Maggio*, 737 F.2d 1372 (4th Cir. 1984), *cert. denied*, 469 U.S. 1002 (1984); *Sireci v. State*, 587 So.2d 450 (Fla. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1500 (1992); *State v. Atkins*, 399 S.E.2d 760 (S.C. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2913 (1991); *People v. Whitt*, 798 P.2d 849, 859 (Cal. 1990); *People v. Anderson*, 801 P.2d 1107 (Cal. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 148 (1991); *People v. Brisbon*, 544 N.E.2d 297 (Ill. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1796 (1990); *Turner v. Commonwealth*, 364 S.E.2d 483 (Va.), *cert. denied*, 486 U.S. 1017 (1988).

are further inapposite because they do not involve admission of evidence.[2]

More importantly, the majority of the cases relied upon by the State of Oklahoma involved a death sentence that had been vacated.[3] Significantly, in each of those cases, the sentencers knew that the defendant would not be put to death unless they themselves determined that he should be, that is, that their decision was a necessary step along the road to execution.

Only four cases cited by the State involve admission of evidence of a prior death sentence for another case.

[2] *Willie v. Maggio*, 737 F.2d 1372 (one or more jurors had learned about the previous death sentence outside of the courtroom prior to being called to jury duty and were examined on voir dire to ensure that they would not be influenced by that prior decision); *State v. Atkins*, 399 S.E.2d 760 (same); *State v. Bell*, 393 S.E.2d 364 (S.C.), *cert. denied*, 498 U.S. 881 (1990) (same); *People v. Whitt*, 798 P.2d 849 (the judge explained to the jury that they were to resentence the defendant whose prior death sentence had been vacated on appeal); *People v. Anderson*, 801 P.2d 1107 (same); *Turner v. Commonwealth*, 364 S.E.2d 483 (same); *Sireci v. State*, 587 So.2d at 452-53 (the prosecutor briefly referred to the defendant's having been on death row; the appellate court noted that "a prior sentence should not play a role in resentencing proceedings" but found that the prosecutor's reference was minimal and agreed with defendant that the jury could not help but perceive that he had been on death row).

[3] *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2277 (1991); *Willie*, 737 F.2d 1372; *State v. Bradley*, 538 N.E.2d 373, 393 (Ohio 1989), *cert. denied*, 497 U.S. 1011 (1990); *Anderson*, 801 P.2d 1107; *Brisbon*, 544 N.E.2d 297; *Whitt*, 798 P.2d 849; *Sireci*, 587 So.2d 450; *Atkins*, 399 S.E.2d 760; *Turner*, 364 S.E.2d 483.

None include persuasive reasoning for affirming the sentence in the case before this Court. In fact, three of the four contain language that lends support to Petitioner's position that a prior death sentence is irrelevant and prejudicial. The fourth involved a case where the jury had no discretion under the circumstances of the case.

In *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), evidence was admitted regarding a prior, unrelated death sentence that had been vacated when the South Carolina Supreme Court declared the state's death penalty statute unconstitutional. The question presented was whether that evidence, coupled with the trial court's use of the word "recommend" in referring to the jury's role, led the jury to believe its role was advisory only. The Court of Appeals for the Fourth Circuit concluded that the evidence concerning the prior vacated death sentence did not improperly describe the jury's role under local law, but agreed with the defendant "that evidence of a prior-vacated death penalty is of limited, if any, relevance to the jury's decision whether to impose the death penalty." *Id.* at 954. Because the jury was not informed that Gaskins was presently under a sentence of death, there was no risk that the jury's sense of responsibility would be diminished in the way that exists in the case at bar. That is, there was no risk that the jury would feel their task in this case was futile, that the defendant would be executed regardless of their decision.

State v. Bradley, 538 N.E.2d 373 (Ohio 1989), *cert. denied*, 497 U.S. 1011 (1990), also involved a prior vacated death sentence, which was referenced in a two hundred eighty-five page police report admitted into evidence. *Id.* at 393 (Brown, J., dissenting). The question on appeal was

whether defense counsel's failure to object to admission of the report constituted ineffective assistance of counsel. The Ohio Supreme Court appreciated that the reference to the prior death sentence was "arguably damaging," but did not believe failure to object to it rose to the necessary level of prejudice to establish ineffectiveness. *Id.* at 382. Because the error was analyzed as an ineffective assistance of counsel claim rather than as a *Caldwell*[4] error, the court placed on the defendant the burden of proving a reasonable probability that the result of the trial would have been different had the police report been excluded. The court found that the defendant did not meet this burden.

In *State v. Williams*, 657 S.W.2d 405 (Tenn. 1983), *cert. denied*, 465 U.S. 1073 (1984), the defendant stipulated to two past murder convictions and the sentences imposed, one of which was the death penalty. When the prosecutor referred to the prior death sentence in making his closing argument, no objection was made. The defendant complained on appeal that the jury might have given him life had it not known of his past sentence of death. Because the defendant stipulated to the evidence and made no objection to the prosecutor's comment, and because the aggravating circumstances were strong and no mitigating evidence was presented, reversal was not required. Perhaps out of concern that its opinion could be misconstrued or broadly applied, the Tennessee Supreme Court specifically emphasized that such evidence should not be admitted except by agreement of the parties. *Id.* at 414-15.

---

[4] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Commonwealth v. Beasley, 479 A.2d 460 (Pa. 1984), a pre-*Caldwell* case, is the only case cited by the State other than *Williams* that both concerned admission of evidence of an unrelated death sentence and raised the question of whether the jury's sense of responsibility was diminished by this evidence.[5] The Pennsylvania Supreme Court relegated the issue to a one-sentence, conclusory footnote which read, "There is no support in the record for appellant's claim that the jury regarded his life as not truly being in its hands, due to awareness of this preexisting death verdict, and, hence, appellant's contention that the death question was not given serious consideration is unfounded speculation." 479 A.2d at 465 n.5.

Had that court had the benefit of this Court's decision in *Caldwell*, and squarely addressed the issue, however, the result would have been the same. *Beasley* exemplifies a situation where a court could reasonably conclude that admission of the evidence had no effect on the jury's verdict. Under Pennsylvania law, when an aggravating circumstance is present and no mitigating circumstances are found, the jury is required to return a verdict of death.[6] *Id.* at 464. In *Beasley*, the jury found one aggravating factor and no mitigating circumstances. *Id.* Thus, a death verdict was mandatory; the jury had no

---

[5] Ironically, the State did not cite *Beasley* for this proposition, but rather, for the proposition that a sentence of death is relevant for the jury to consider. The Pennsylvania Supreme Court reached this conclusion solely as a matter of state law interpretation of the term "conviction" as used in the statute governing introduction of aggravating evidence.

[6] This Court affirmed that aspect of Pennsylvania's death scheme in *Blystone v. Pennsylvania*, 494 U.S. 294 (1990).

discretion. The fact that the defendant had already been sentenced to die could have had no effect on the jury's verdict.

Of the four cases cited by the State that concern admission of evidence of a death sentence in another case, in two of the cases, *Gaskins* and *Bradley*, the jury knew that sentence of death had been vacated; in *Beasley* the jury had no discretion under the facts of the case and the law of the state; and in *Williams* the defendant stipulated to the evidence. Not one of these cases can be read as an endorsement of admitting evidence that a capital defendant has already been sentenced to death for another murder.

2. *"The Judgment and Sentence, though later reversed, was still relevant evidence to prove the 'continuing threat' aggravating circumstance."* Brief of Respondent at 39. *"[T]he prior [vacated] conviction for murder is still relevant to an aggravating factor. . . . "* Amici Curiae Brief at 11 n.1.

The evidence of the prior murder conviction, including the later-vacated Judgment and Sentence at issue in this appeal, was introduced to support two aggravating circumstances: that the defendant had been previously convicted of a felony involving the use or threat of violence **and** that the defendant posed a continuing threat to society. The Oklahoma Court of Criminal Appeals determined that reversal of the Thompson conviction rendered it unavailable to support the prior violent felony aggravator, but the opinion is unclear as to whether the conviction could be used to support the continuing threat

aggravator. *Romano v. State*, 847 P.2d 368, 389 (Okla. Crim. App. 1993).

This Court's opinion in *Johnson v. Mississippi*, 486 U.S. 578 (1988), however, was not unclear. The Court held that allowing a death sentence to stand that was based in part on a vacated conviction violates the Eighth Amendment. The Court unequivocally stated that reversal of a conviction deprives the documentary evidence of that conviction of any relevance.

The State argues that the evidence of the vacated judgment and sentence for the Thompson homicide was not "materially inaccurate" as was the case in *Johnson v. Mississippi* because the document in this case was used to support two aggravators instead of one. This argument defies logic. If use of an invalid non-death penalty conviction to support one aggravator violates the Eighth Amendment, it follows, *a fortiori*, that using a vacated death penalty conviction to support two aggravating factors is at least twice as egregious.

3. *"[A]ny infirmity with the Judgment and Sentence caused by its later reversal was harmless error as applied to the 'continuing threat' aggravating circumstance"* because *"[i]n addition to the Judgment and Sentence in the Thompson case, the State also presented witnesses during the sentencing stage who testified as to the defendant's involvement in the Thompson murder."* Brief of Respondent at 39-40.

"Far more convincing to the jury than the bare Judgment and Sentence which was introduced here were the facts of the Thompson murder which were testified to by different witnesses. The underlying facts of the Thompson murder were important to

establish the continuing threat aggravating circumstance. It is illogical to assume that the jury placed more weight on the court document than they did the live testimony of the witnesses." Brief of Respondent at 57, footnote omitted.

"[E]vidence of the prior murder itself would properly tend to lead the jury to the conclusion that a capital sentence was appropriate in this case. What Petitioner posits is that this jury's awareness of the additional extraneous fact that Petitioner was under another capital sentence would make the difference in this jury's determination between a sentence of life and death on the facts of this case. . . . It is far more likely that the jury would conclude instead that the death penalty was appropriate in this case because the defendant had committed a previous murder. . . . " Amici Curiae Brief at 11.

Despite the State's and Amici's heavy reliance on evidence of the Thompson homicide as rendering harmless the admission of the evidence of the death sentence for the Thompson homicide, neither elaborates on what witnesses were presented or the testimony they gave, nor gives citation to the record where that evidence was presented. As discussed below and as the record shows, no evidence suggested that the defendant was involved in the Thompson murder.[7]

---

[7] The Respondent's Brief also misstates evidence of this trial by confusing the defendant with his co-defendant David Woodruff. The Statement of Facts recites that on October 12, 1985, the defendant and Woodruff went to an electronics store where the defendant knew the manager, and that the manager noticed a stain on the defendant's pants that looked like blood. Upon inquiry, the manager was told that he had cut his hand while painting a house. Respondent's Brief at 5-6. Actually it

The opinion below correctly states that the evidence comprised testimony by "Thompson's neighbor concerning her observation the day of the homicide, the autopsy report reflecting the pathological diagnoses of the victim and photographs and fingerprints showing that the defendant in that case was in fact the Appellant."[8] 847 P.2d at 389. The assertion that this evidence proved that Mr. Romano killed Lloyd Thompson and that he constituted a continuing threat to society is misleading.[9] Ironically, a more detailed review of the evidence reveals how it failed to implicate Mr. Romano in the Thompson homicide.

Olie Irvin, the neighbor who testified, neither identified anyone nor described the person or persons she saw changing Thompson's tire on the day of the homicide, even as to the most general details such as the number,

---

was Woodruff who knew the Manager, and it was Woodruff who allegedly had a cut on his hand and a stain on his pants. (Tr. IV 20, 22-23).

[8] Absent from the court's summary of evidence is reference to testimony given by Greg Myers. Apparently the Oklahoma court disregarded Mr. Myers' testimony in its evaluation of the evidence supporting "continuing threat" because Mr. Myers recanted his testimony. *See* Petitioner's Brief at 6 n.4.

[9] The Opinion rendered in this case by the Oklahoma Court of Criminal Appeals likewise implies that there was more evidence concerning the Thompson murder than actually exists in the record. The court found that "the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence." 847 P.2d at 389, and that those facts were sufficient to support the continuing threat circumstance. 847 P.2d at 394.

gender, or race. At most her testimony suggested circumstantially that the unknown person who helped change the tire was in the apartment when Thompson was killed. (Tr. VI 25-28).

The remaining evidence introduced likewise did not remotely connect the Petitioner with the Thompson homicide. The autopsy report reflected the pathological diagnosis of the victim and did not implicate the Petitioner in any way. (Tr. VI 45). The final evidence to which the Oklahoma Court referred was "photographs and fingerprints showing that the defendant in that case was in fact the Appellant." 847 P.2d at 389. This reference was not to fingerprints found at the Thompson homicide scene or to photographs linking the Petitioner to the crime, but rather to the stipulation by the parties that J.T. Rupe, who keeps records for the Oklahoma County Sheriff, would testify that the prior felony convictions involved the same defendants that were on trial. (Tr. VI 47). The only significance of this stipulation, after the conviction for first-degree murder was vacated, was to establish the non-violent prior felony convictions used to enhance the robbery conviction in this case. Thus, the stipulation provided no support for the death penalty.

Without the documentary evidence of the murder conviction, which cannot lawfully be considered in light of the reversal, no evidence whatsoever connected Mr. Romano to the Thompson murder. The State's and Amici Curiae's arguments that proof of the Thompson homicide, and not the death sentence, actually compelled the Sarfaty jury to sentence the Petitioner to death are specious.

> 4. *"[T]he Oklahoma Court applied a harmless error analysis and determined that the prior death sentence evidence could not have affected the jury's sentencing verdict in this case."* Respondent's Brief at 12 (emphasis added). See also Respondent's Brief at 29.

Actually, the Oklahoma Court did neither. Rather than determining that the prior death sentence evidence could not have affected the jury's sentencing verdict, the court recognized its potentially damaging effect: "Learning that the defendant had previously received a death sentence for another murder **could** diminish the jury's sense of importance of its role and mitigate the consequences of their decision." 847 P.2d at 390 (emphasis added). Rather than applying the harmless error test, the court presumed the jury's decision to be correct, *id.* at 391, and found it "highly unlikely" that the jury's sense of responsibility would have been diminished.[10] *Id.* at

---

[10] The court's opinion that it was highly unlikely that the jury's sense of responsibility was not diminished was based in part on a misstatement of instructions. The Oklahoma Court found that the trial court's instructions prevented the evidence of the prior death sentence from causing the jury to consider their decision any less significant. In describing the instructions that allegedly had this preventative effect, the court stated that the jury was instructed "that they should not surrender their own judgment to that of any witness **or item of evidence**. . . ." 847 P.2d at 390 (emphasis added). Neither the Court of Criminal Appeals' Opinion nor the Respondent's Brief cites the location in the record of an instruction informing the jury they should not surrender their judgment to any item of evidence, nor can counsel find any such instruction.

390. The test for harmless error does not include according a presumption of correctness to the verdict. *Cf. Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) ("[t]he question . . . is not whether the legally admitted evidence was sufficient to support the death sentence"). Moreover, the "highly unlikely" test differs significantly from the "harmless error" test both in the quantity of proof required and in the allocation of that burden of proof. The harmless error standard requires the State to prove beyond a reasonable doubt that the evidence complained of did not influence the jury's decision. *Id.* The "highly unlikely" standard allocates the burden of proof to the defendant and allows affirmance even though a possibility remains that the jury's sense of responsibility was diminished.

CONCLUSION

The judgment of the Oklahoma Court of Criminal Appeals affirming Petitioner's sentence of death should be reversed.

Respectfully submitted,

LEE ANN JONES PETERS*
ROBERT A. RAVITZ
JULIA SUMMERS
JAMES DENNIS

Office of the Public Defender
of Oklahoma County
320 Robert S. Kerr, Rm 611
Oklahoma City, OK 73102
Telephone: (405) 278-1550

**Counsel for Petitioner*

(8)

No. 92-9093

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

John Joseph Romano,

Petitioner,

vs.

State of Oklahoma,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

---

Brief for the States of Ohio, Arkansas, Connecticut, Delaware, Mississippi, Montana, Nebraska, Pennsylvania, South Carolina and Virginia as Amici Curiae in Support of Respondent

---

Additional State(s) - Indiana

LEE FISHER
Attorney General

RICHARD A. CORDRAY
State Solicitor
(Counsel of Record)

SIMON B. KARAS
Deputy Chief Counsel

CORDELIA A. GLENN
MARY L. HOLLERN
Assistant Attorneys General
State Office Tower
30 East Broad Street
17th Floor
Columbus, Ohio 43215
(614) 466-5026

COUNSEL FOR AMICUS CURIAE STATE OF OHIO
[Other Counsel Listed on Inside Front Cover]

21PP

Honorable Winston Bryant
Attorney General of Arkansas
323 Center Street
Little Rock, Arkansas 72201

Honorable Richard Blumenthal
Attorney General of Connecticut
P.O. Box 120
55 Elm Street
Hartford, Connecticut 06106

Honorable Charles M. Oberly, III
Attorney General of Delaware
820 North French Street
Wilmington, Delaware 19801

Honorable Mike Moore
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

Honorable Joseph P. Mazurek
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401

Honorable Don Stenberg
Attorney General of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509

Honorable Ernest D. Preate, Jr.
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Honorable T. Travis Medlock
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Honorable Stephen D. Rosenthal
Attorney General of Virginia
101 North 8th Street
Richmond, Virginia 23219

Honorable Pamela Carter
Attorney General of Indiana
200 West Washington Street
219 State House
Indianapolis, Indiana 46204

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTEREST OF THE AMICI CURIAE

The amici States are involved through their criminal justice systems in cases in which the death penalty is imposed as the appropriate sanction. Capital sentences are imposed by the authority of and carried out in the name of each of these States. In performing these functions, the States are also carrying out the will of their citizens, who have indicated support for the death penalty through their legislatures by including this ultimate sanction within the range of permissible punishments. And in performing these functions, the amici States expend tremendous resources of time, personnel, and money to solve and prosecute the crime involved, to defend the validity of the conviction and sentence both on direct review and in collateral challenges, and eventually to fulfill the final decree.

Neither the amici States nor their citizens have a legitimate interest or desire to have the death penalty imposed in cases in which such a penalty would be inappropriate. The amici States and their citizens do have a legitimate interest in ensuring that the death penalty is reserved only for the most heinous of crimes and is applied only under the most serious circumstances. In such cases, however, the amici States have a vital interest in ensuring that the tremendous amount of their resources that are brought to bear to obtain a capital sentence are not easily held for naught.

This case involves the familiar tension between the twin goals of fairness to a defendant who has received a capital sentence and fairness to a State and its citizens, which have an interest in the finality and application of legitimate criminal sanctions. The amici States are the sovereign entities that are most directly affected by the balance this Court may draw to reconcile these opposing interests. In this case, the amici States urge the Court to affirm the judgment of the Oklahoma Court of Criminal Appeals, which struck the appropriate balance here. The amici States also urge this Court to reject as a proposition of law that the mere truthful mention to the jury that another jury has previously imposed a capital sentence on this defendant in an entirely different

case must so undermine the jury's sense of responsibility that constitutional due process is *per se* violated, such that any attempt to impose a capital sentence on the facts of this particular case is necessarily void.

QUESTION PRESENTED

DOES ADMISSION OF EVIDENCE THAT A CAPITAL DEFENDANT ALREADY HAS BEEN SENTENCED TO DEATH IN ANOTHER CASE IMPERMISSIBLY UNDERMINE THE JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF THE DEFENDANT'S DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

SUMMARY OF ARGUMENT

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court held that the Eighth and Fourteenth Amendments are violated where a jury is affirmatively misled about its actual responsibility for imposition of a capital sentence. Subsequent decisions interpreting and applying *Caldwell* have made clear that its holding is limited to cases in which the jury is affirmatively misled into a false belief that such responsibility lies elsewhere.

Knowledge on the part of a sentencing jury that a capital defendant has already been convicted of murder and sentenced to death in a different case does not affirmatively mislead the jury about its proper role in the sentencing process. Such information, if accurate and correct, may or may not be relevant to the sentencing determination under principles of state law, but the jury's awareness of such information does not, in and of itself, violate due process by so undermining the jury's sense of responsibility for determining the appropriate sentence that it taints and distorts the entire judicial proceedings.

Rather than applying the *Caldwell* standard in such cases, this Court should instead apply the "fundamental fairness"

standard that was approved in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), to determine whether the jury's awareness that the defendant received the death sentence in a previous case violates due process when the jury exercises its authority to consider and judge the facts presented in an entirely different case.

ARGUMENT

I. THIS COURT'S DECISION IN *CALDWELL v. MISSISSIPPI*, 472 U.S. 320 (1985), IS LIMITED TO CASES IN WHICH A JURY IS AFFIRMATIVELY MISLED AS TO ITS SENSE OF RESPONSIBILITY FOR IMPOSITION OF THE DEATH PENALTY.

This Court's capital sentencing jurisprudence under the Eighth and Fourteenth Amendments has sought to balance two competing interests. On the one hand, the Court has insisted on a process that focuses and directs the sentencer's discretion in imposing the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). In *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), this Court stated:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

This special concern with the fairness of the process stems directly from the unique and extremely grave nature of the death penalty itself. There are numerous statements to this effect, both by individual Justices and collectively from this Court, with the following statement perhaps being illustrative of this view:

> Death as a punishment is unique in its severity and irrevocability. Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations.

Barclay v. Florida, 463 U.S. 939, 958 (1983) (Stevens, J., concurring). And it is "the qualitative difference of death from all other punishments" that "requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

On the other hand, there is the practical reality that not every departure from an established process, which is itself wholly sound, will cause a result that is improper or inappropriate to the particular circumstances of the offender's crime and background. As summarized by Chief Justice (then Associate Justice) Rehnquist:

> Similarly, this Court's recent opinions concerning the Eighth Amendment, . . . have also noted that in general the Eighth Amendment is satisfied where the procedures ensure that the sentencer's discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant v. Stephens*, 462 U.S. 862, 874 (1983); *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion). Thus, in both *Zant* and *Barclay* we upheld death sentences despite the fact that they had been based in part on invalid aggravating circumstances, where the jury also had found valid aggravating circumstances.

Caldwell v. Mississippi, 472 U.S. 320, 348 (1985) (Rehnquist, J., dissenting).

In *Caldwell v. Mississippi, supra*, this Court reconciled the tension between these interests in a narrow and egregious factual context. In *Caldwell*, the prosecutor made affirmative representations to the jury which created the misimpression that they were not the final determiners of the death penalty,

and the trial court failed to take any action to correct that misimpression which misled the jury. The Court concluded:

> . . . it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

472 U.S. at 328-29. In concurrence, Justice O'Connor added:

> I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision thereby creating an unacceptable risk that the "death penalty [may have been] meted out arbitrarily or capriciously," or through "whim . . . or mistake."

472 U.S. at 343 (O'Connor, J., concurring) (citations omitted).

In *Caldwell*, the Court concluded that the entire capital sentencing process itself was hopelessly undermined by the prosecutor's misleading comments to the jury. One of the assumptions that underlies or perhaps even mandates discretion in capital sentencing is the basic assumption that the sentencer is capable of exercising discretion to perform that task if given proper guidance. As noted by the Court:

> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with — and indeed as indispensable to — the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."

472 U.S. at 330 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Accordingly, the Court concluded that the misleading impression given to the jury that it did not bear this responsibility itself gave the jury "a view of its role

in the capital sentencing procedure that was fundamentally incompatible" with the foundational premises that underlie this Court's capital sentencing jurisprudence. *Caldwell*, 472 U.S. at 340.

Subsequent cases demonstrate that the reach of *Caldwell* has been limited to the outright sabotaging of an otherwise fair process which occurred in that case, where the prosecutor presented the jury with an affirmative misrepresentation of its role in capital sentencing. Thus, for example, in *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986), this Court stated:

> *Caldwell* is relevant only to certain types of comment — those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.

In *Darden*, the Court rejected a claim that the prosecutor's impassioned and improper arguments to the jury in that case constituted a Caldwell error, stating in the same footnote:

> In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to increase the jury's perception of its role.

Similarly, in *Dugger v. Adams*, 489 U.S. 401 (1989), the Court again characterized the holding in *Caldwell* as being limited to statements that affirmatively mislead the jury in order to diminish improperly the jury's sense of its own ultimate responsibility. 489 U.S. at 407. Although in the end *Dugger* was decided on the basis of procedural default, the Court declared that "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Id.* Under Florida law, a jury's verdict on sentencing constituted a recommendation that the trial judge could disregard. As

a result, the trial judge in *Dugger* repeatedly advised the jury that he was the ultimate determiner of the appropriate sentence, and they were not. This was misleading, however, as the jury was not told that their recommendation could be set aside only where the judge had a clear and convincing belief that the jury's recommendation was wrong, and thus the alleged error was understood to implicate *Caldwell*. See *id.* at 407-08.

Finally, in *Sawyer v. Smith*, 497 U.S. 227 (1990), the Court considered a *Caldwell*-type claim in a case that was ultimately decided on grounds of procedural default. In the course of its opinion, the Court characterized *Caldwell* as a case in which the jury was affirmatively misled into holding false beliefs about the nature of its responsibilities in the capital sentencing process. As the Court summarized: "In *Caldwell*, we held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." *Id.* at 233; see also *id.* (basis for ruling in *Caldwell* was that "false information of this type might produce 'substantial unreliability as well as bias in favor of death sentences' ") (quoting *Caldwell*, 472 U.S. at 330); *id.* at 235 (in *Caldwell*, "false prosecutorial comment created an 'unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously' ") (quoting *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring)) (internal brackets and quotes omitted).

This Court therefore has determined in numerous subsequent decisions that its holding in *Caldwell* is limited to cases where the jury's sense of responsibility for determining a capital sentence is improperly diminished because it was affirmatively misled into a false belief that such responsibility lies not upon its own shoulders, but instead lies elsewhere. That situation, however, does not obtain in this case, as will be shown below.

II. KNOWLEDGE ON THE PART OF A SENTENCING JURY THAT A CAPITAL DEFENDANT HAS ALREADY BEEN SENTENCED TO DEATH IN ANOTHER CASE DOES NOT AFFIRMATIVELY MISLEAD THE JURY AS TO ITS ROLE AND THUS DOES NOT, IN AND OF ITSELF, UNDERMINE THE SENTENCING JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE APPROPRIATE SENTENCE.

Unlike *Caldwell*, this case does not involve a prosecutor who has affirmatively misled the jury about its ultimate sentencing responsibility. Nor does this case involve a trial judge's failure to correct such a misimpression either by silence or, as in *Caldwell*, by affirmative ratification of the prosecutor's comments. Rather, this case involves the jury's extraneous receipt of an objectively correct fact — that the defendant had received a prior death sentence in another case — during the course of the prosecutor's attempt to prove the aggravating circumstances that are authorized by statute to be considered as part of the capital sentencing process. It does not appear that the prosecutor ever argued or even attempted to suggest that a capital sentence would be justified in this case because Petitioner had previously been sentenced to death in another case. Moreover, in this case the trial judge properly instructed the jury about their role and their responsibilities in determining the appropriate sentence. Therefore, regardless of whether the mention of the defendant's previous capital sentence was relevant, material, or proper as a matter of state evidentiary law, its receipt by the jury did not violate the due process of law that is guaranteed in the Federal Constitiution. See, e.g., *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida, supra.*

Petitioner asks this Court to make a presumptive leap to find that the mere knowledge that the defendant was sentenced to death in another case would, in and of itself, so undermine the jury's sense of responsibility that it would be unable to make a proper sentencing determination in this case. He thus asks this Court to hold that the mere mention of this fact would have the same extreme effect

as did the affirmatively misleading statements in *Caldwell*, by unavoidably distorting and tainting an otherwise fair sentencing process. There is a crucial difference, however, between a juror's mere knowledge of certain facts and the same juror's capacity to act impartially after considering and evaluating all the facts presented in a particular case.

Thus, for example, not every trial in which there has been pretrial publicity of which jurors are aware will necessarily result in a reversal of a conviction on due process grounds. Pretrial publicity which makes a juror aware of certain facts does not, *per se*, destroy a juror's ability to be impartial. See e.g., *Dobbert v. Florida*, 432 U.S. 282 (1977). It is only in the egregious case, where a juror is shown to be utterly unable to render an impartial judgment, that a violation of the Due Process Clause will be found. *Irvin v. Dowd*, 366 U.S. 717 (1961).

For example, the Ohio Supreme Court articulated the above principle in *State v. Zuern*, 32 Ohio St.3d 56 (1987), *cert. denied*, 484 U.S. 1047 (1988):

> We feel it is reasonable to state that a juror's knowledge concerning the existence of certain facts is separable from the juror's capability to act impartially in considering matters presented to him for determination. While trial courts rather uniformly seek to control juror knowledge in order to prevent bias, it is a fact of life that a great many trials occur in communities where significant and potentially prejudicial facts are made known about the defendant.

Id. at 60. Thus, in *Zuern* the Court denied a mistrial where an inmate witness disclosed that the defendant was in jail on a pending murder charge at the time he stabbed a corrections officer. The Court found no error in light of both the extensive *voir dire* that was permitted during jury selection to establish the jurors' impartiality and the further instructions that were provided to the jury by the trial court.

Petitioner's argument here rests on an entirely fallacious premise — that the jurors will not only speculate about the effect of the other capital sentence, but that they will speculate about it *in a particular way*, such that they will be more likely to impose the death penalty themselves in this particular case. Yet judicial speculation as to what individual jurors might speculate is a dangerous and very unpredictable exercise. See, e.g., *Dobbert v. Florida*, 432 U.S. at 294 & n.7 (observing that knowledge of the very same fact could incline some jurors to rigor and others to leniency); *Darden v. Wainwright*, 477 U.S. at 184 n.15 (same). In *California v. Ramos*, *supra*, this Court rejected a defendant's argument that a jury should be advised that the Governor has the power to commute a capital sentence, because such advice could work to the defendant's disadvantage:

> In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

463 U.S. at 1011.

Thus, even if one were to accept the view that the jury would be led to speculate extraneously in the circumstances of this case, it is not at all clear that the jury would speculate in the fashion proposed by Petitioner. The jury might, in fact, be more prone to impose a life sentence if the individual jurors believed, for example, that they had been somehow absolved from making the weighty choice between life and death, since that choice had already been made definitively by some other jury in an entirely different case.

Even more important, it is altogether unclear that a jury would speculate at all about the effect and application of the other capital sentence. The fact that another jury had convicted Petitioner of an independent murder was itself clearly relevant to two of the aggravating circumstances then before the jury for consideration, *viz.*, previous commission

of a "felony involving the use or threat of violence" and "the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Thus, evidence of the prior murder itself would properly tend to lead the jury to the conclusion that a capital sentence was appropriate in this case. What Petitioner posits is that this jury's awareness of the additional extraneous fact that Petitioner was under another capital sentence would make the difference in this jury's determination between a sentence of life and death on the facts of this case.[1] Yet this is speculation running amok. It is far more likely that the jury would conclude instead that the death penalty was appropriate in this case because the defendant had committed a previous murder, and the particular sentence that the jury had imposed in the prior case would be at most a marginal factor in its considerations.

Moreover, in this case the jury was given a verdict and sentence form that informed them of the previous murder committed by Petitioner and the capital sentence he received in that case. The verdict and sentence form, however, showed both that Petitioner intended to appeal his conviction in the prior case and that the execution date set for the prior murder conviction was actually several weeks before the start of his trial in this case. Since Petitioner obviously had not been executed at the time this trial went forward, the jury — to the extent they would speculate about the document at all — would very likely understand that the prior capital

[1] The court below held that "prior commission of a violent felony" could no longer be an aggravating circumstance once the prior conviction had been overturned, but that the prior overturned conviction would still have been relevant to the jury's consideration of whether the defendant poses a "continued threat to society." *Romano v. State*, 847 P.2d 368, 389 (Okla. Crim. App. 1993). Accordingly, the court below did not overturn the death penalty even though one aggravating factor fell, since another valid aggravating factor continued to exist. See *id.* And because the prior conviction for murder is still relevant to an aggravating factor, it remains entirely speculative whether the jury's knowledge of the prior capital sentence would have any effect on its deliberations at all.

sentence could not be a final sentence upon Petitioner, and indeed it was later overturned by a reviewing court.

Finally, it is a fundamental principle of law that a jury is capable of receiving and acting according to jury instructions. *Cupp v. Naughten*, 414 U.S. 141 (1973). And there is no reason to believe the jury did not follow the trial court's instructions in this case. In *Cupp*, the Court did not find a violation of due process even though the jury had been given a "universally condemned" instruction on "presumption of truthfulness," since the jury had also been instructed on the defendant's presumption of innocence and on their obligation to find that the State had proved the defendant's guilt beyond a reasonable doubt. The Court stated:

> In this case, while the jury was informed about the presumption of truthfulness, it was also specifically instructed to consider the manner of the witness, the nature of the testimony, and any other matter relating to the witness' possible motivation to speak falsely. It thus remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible.

414 U.S. at 149.

Similarly, in this case the jury remained free to exercise its collective judgment about life or death, despite the extraneous admission of the other capital sentence. As the court below noted, the jurors had been extensively instructed here about their obligations and responsibilities:

> The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished . . .

Romano v. State, 847 P.2d 368, 390 (Okla. Crim. App. 1993).

III. THE COURT SHOULD USE THE STANDARD OF *DONNELLY v. DeCHRISTOFORO*, 416 U.S. 637 (1974), IN DETERMINING WHETHER ADMISSION OF A PRIOR SENTENCE OF DEATH VIOLATES DUE PROCESS IN A PARTICULAR CASE.

Petitioner cites various state decisions in support of his position. See *People v. Davis*, 452 N.E.2d 525 (Ill. 1983); *People v. Hope*, 508 N.E.2d 202 (Ill. 1986); *West v. State*, 463 So. 2d 1048 (Miss. 1985). Contra *State v. Bell*, 393 S.E.2d 364 (S.C.), *cert. denied*, 498 U.S. 881 (1990). Interestingly, however, the only favorable state decisions cited by Petitioner were decided not on constitutional due process grounds, but instead were decided on pure state-law grounds of whether certain evidence could be introduced in a capital sentencing proceeding under state statutes. Indeed, none of the decisions cited by Petitioner even mentions *Caldwell* at all, though the contrary decision by the South Carolina Supreme Court in *Bell* does specifically reject the view that *Caldwell* has any application to the issue raised here. This general reluctance to apply *Caldwell* in cases similar to this one is significant; it further suggests that Petitioner seeks to misapply its specific holding here. As this Court has previously observed, "the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution." *Dugger v. Adams*, 489 U.S. at 409; see also *Sawyer v. Smith*, 497 U.S. at 239 (argument made to the contrary is flawed).

Whatever the resolution of the various state courts may have been in particular cases, the amici States submit that the proper legal standard for judging whether a constitutional violation has occurred in such cases is found not in *Caldwell*, but in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

In *Sawyer v. Smith*, *supra*, this Court explained the relationship between a *Caldwell* claim and a *Donnelly* claim. In *Sawyer*, the Court refused to apply *Caldwell* to a case that was already final on the date *Caldwell* was decided. Under this Court's retroactivity decisions, a new rule of constitutional law is not generally applied retroactively to

cases that are already final at the time of decision. *Teague v. Lane*, 489 U.S 288 (1989).

In *Sawyer*, the Court held that *Caldwell* announced a new rule of law — an Eighth Amendment guarantee of sentencing reliability free from the distorting taint of misleading comments, which guarantee was afforded over and above the general due process standard of fundamental fairness that was set out in *Donnelly*. See 497 U.S. at 233-37. The *Caldwell* rule was designed to enhance the reliability of the sentencing process in those cases where the process itself had been rendered fundamentally defective; *Caldwell* carried out this mandate by requiring reversal of a death penalty when a mere potential for error existed, rather than only in circumstances where prejudice had been actually established.

However, as set out above, no *Caldwell* error was committed here. There was no affirmative misleading of the jury, no "false prosecutorial comment," *Sawyer*, 497 U.S. at 235, and no "false information [that] might produce 'substantial unreliability as well as bias in favor of death sentences,' " *id.* at 233 (quoting *Caldwell*, 472 U.S. at 330). Thus, since *Caldwell* does not apply, the residual *Donnelly* standard does.

In *Donnelly*, the Court evaluated a prosecutor's closing argument against a due process standard and held:

> . . . not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice."

416 U.S. at 642 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). In *Donnelly*, the Court looked at a trial as one entire whole and held that alleged due process errors need to be judged against the larger context of the entire trial, rather than being taken in isolation, to determine whether the defendant was deprived of "fundamental fairness." The

same standard should be applied here to judge the validity of a capital sentencing determination in the absence of any *Caldwell* error.

Here, there is no specific *Caldwell* violation and nothing in this capital sentencing process was judged by the Oklahoma courts to constitute reversible error under state law. All that is alleged is a minor departure from a process which is itself entirely fair. In *Donnelly*, the Court stated:

> . . . it is by no means clear that the jury did engage in the hypothetical analysis suggested by the majority of the Court of Appeals, or even probable that it would seize such a comment out of context and attach this particular meaning to it.

416 U.S. at 644. Similarly, it is unclear that the jury here would even engage in the speculative analysis suggested by Petitioner, attach meaning to this extraneous fact in carrying out its duties, or draw from it the adverse conclusion that Petitioner has suggested. On the contrary, this jury was carefully and properly instructed in regard to its responsibilities. Speculation thus should not suffice to set aside the results of this trial and sentencing as being "so fundamentally unfair as to deny him due process." *Id.* at 645.

CONCLUSION

For the reasons stated above, as well as those stated in the Brief for Respondent, the decision of the Oklahoma Court of Criminal Appeals should be affirmed.

Respectfully submitted,

LEE FISHER
Attorney General

RICHARD A. CORDRAY
State Solicitor
(Counsel of Record)
SIMON B. KARAS
Deputy Chief Counsel
CORDELIA A. GLENN
MARY L. HOLLERN
Assistant Attorneys General
State Office Tower
30 East Broad Street
17th Floor
Columbus, Ohio 43215
(614) 466-5026

COUNSEL FOR AMICUS CURIAE
STATE OF OHIO

January 18, 1994